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INTERNATIONAL LAW

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INTERNATIONAL LAW

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TO THOSE WHO GAVE THEIR LIVES
1914-1918
IN THE HOPE THAT NEW PRINCIPLES OF JUSTICE
MIGHT BE FOUND TO GOVERN THE RELATIONS OF STATES
THIS STUDY OF THE EXISTING LAW
IS DEDICATED

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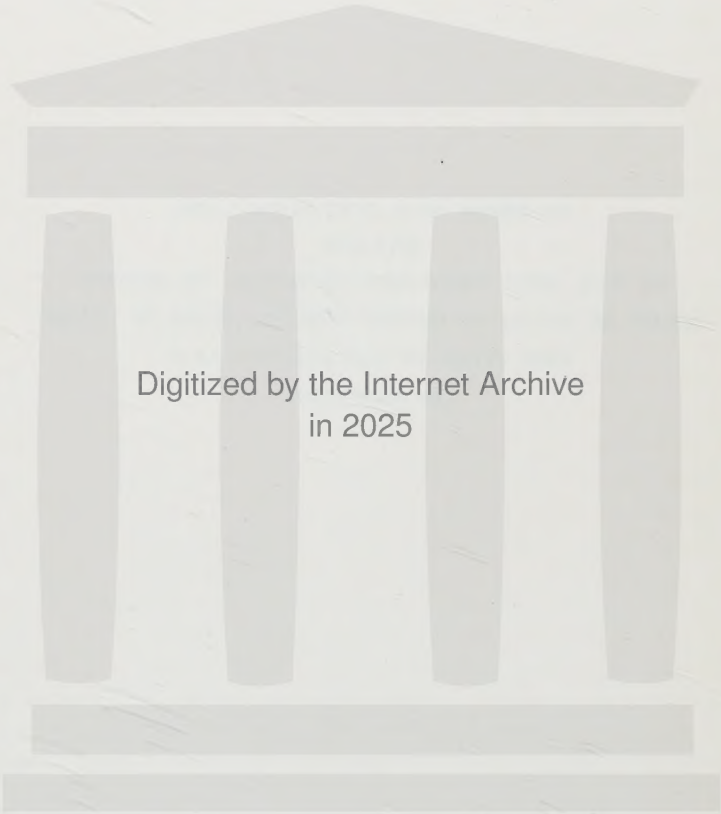

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PREFACE

Since the outbreak of the World War the intimate bearing of international law upon the peace and prosperity of the world at large has come to be realized by the general public as well as by statesmen and scholars. A world-wide conflict, which was marked in its inception by an acknowledged violation of international law under stress of alleged national safety, directed attention on all sides to the meaning of the term "law" as used between nations. If international law was law, why was there no sense of collective responsibility on the part of the nations at large to prevent the settlement of disputes by armed force? Why were the leading nations found grouped together in opposing alliances rather than coöperating for the common good? Why did states appear to be each the judge in its own case, and each entitled to resort to war for the enforcement of the rights claimed by it?

This initial question was followed by other more searching ones as the war proceeded. There were said to be laws of war as between belligerent states. But it appeared that actually these were, for the most part, only conditional restrictions, which could be regarded lightly and even evaded entirely in times of emergency. Ruthless measures of suppression were applied to the population of an invaded country, new instruments of warfare appeared in the form of poisonous gases, new methods of combat were resorted to in submarine attacks upon merchant vessels, a more rigid application was made of the rules of contraband and blockade. These and other practices seemed to reduce the supposed legal code of warfare to an empty formula. Whether on land or on sea, the rule of the strongest appeared, with but few limitations, to prevail.

As the war continued and the area of hostilities widened, it was realized that the causes of the conflict lay deeper than the mere absence of a judicial organization among the states forming the family of nations. The problem of war as a method of procedure for the enforcement of national rights was seen to be subordinate to the problem of adjusting both the political and the economic rivalries of nations. What, then, was the scope of international law in respect to the regulation of these fundamental

interests of states? What facts of national life underlay the political policies adopted by different nations, such as those embodied in the Monroe Doctrine and the parallel doctrines of other states? What conditions of domestic welfare explained the struggle for economic advantages in the undeveloped territories of backward states? Observation showed that while international law had been successful in regulating a large number of the less important interests of states, it fell short of regulating the most acute problems of the international community. So far as it extended, its influence had been, on the whole, beneficent; its failure consisted in its restricted scope.

The close of the war offered for the moment the prospect of the development of a new and more adequate international law. But in spite of the legal structure of the League of Nations and of the tangible and important results already accomplished by that body, the international community has for the present remained in its political relationships fundamentally unchanged by it. Arbitrary conduct has continued to mark the policy of individual states, the rivalries of the period before 1914 have reappeared, and separate alliances have been formed in Central Europe. While the Assembly of the League has done much to organize an international public opinion and while the administrative agencies of the League have demonstrated the possibilities of international coöperation and increased the sense of international unity, it still remains true that in respect to what they consider their vital interests the nations, with but few exceptions, appear reluctant to forego their time-honored privilege of taking the law in their own hands.

It would seem, therefore, that there is need for a fresh examination of the rules of international law. The inquiry must, however, go deeper than a mere restatement of the rules of 1914, together with such changes as have been introduced by new conditions and recent precedents. The fundamental issue must be raised as to the real nature of what is called international law. Is it law in the sense in which the term is applied to national law? What are its special and unique characteristics? How far does it parallel, and what analogies does it offer to, the municipal law of the individual state? How is international law established, what sanctions are there to support its rules, and how far are they effective? Further, it is important to inquire into the scope of international law, and to mark off those fields now occupied by the law in more or less adequate form from other fields of international

relations which lie outside the law. The present loose use of the term "international law" makes the delimitation of its actual scope all the more necessary.

A searching discussion of these and related questions belongs more properly to a treatise on International Jurisprudence. The purpose of the present text is rather to set forth in as clear and concise terms as possible the existing state of things. The attempt has been made, therefore, to present international law as a positive system, and to distinguish as sharply as is feasible between such rules as have legal validity, in the sense that they are generally accepted, and such other rules as individual governments or writers, guided by altruistic or by selfish motives, have asserted are or should be the law. The present principles and practices of the nations form thus a starting point. By them may be judged the legal validity of the claims made by states seeking to enforce their national interests as against the interests of other members of the international community.

On the other hand, looking to the future, the existing rules of international law may be tested by the general conceptions of justice prevailing within individual states, and conclusions may thus be drawn for the constructive amendment or enlargement of the law. This latter task is, in spite of its great importance, beyond the scope of the present volume. Its implications are, indeed, suggested here and there when glaring defects of the law are under consideration; but beyond this it has been neither feasible nor advisable to make constructive proposals. Reforms will be more readily forthcoming once the knowledge of present conditions has become more general.

While maintaining, however, this positive attitude toward the rules of international law, the author has attempted to treat the subject in such a way as to throw light upon the true character of the law and to point out the limited scope of its operation. International law is still in a formative state, and there is need, in consequence, to interpret the law in the light of general jurisprudence and to point out its practical meaning in contrast with its abstract principles. Impatience is sometimes expressed with treatises which fail to present the law as a set of definite and categorical rules. But it can only be said that any treatise undertaking to do this would exclude from its scope the large body of usages and customs which lie on the outskirts of the law. The fundamental conceptions of international law are on the whole clear and precise.

When, however, governments come to apply general principles to concrete situations a wide field is opened up for differences of interpretation, and usage is not always sufficiently clear evidence of the correct inference in the case. In consequence there are many branches of the law in which it is difficult to make explicit and definite statements. The lawyer may seek the precision of a legal code; the scholar must be content with a balanced statement of general, and at times conflicting, practice.

The following pages are offered as a text rather than as a general treatise. Fundamental principles are emphasized, and the leading features rather than the more minute details of international practice are set forth. Two considerations have been kept prominently in mind. The first is the need of showing the development of the general principles of the law, in order that their present validity may be better understood. With this object in view, frequent references have been made to the classic treatises of Grotius and Vattel, each of which is a landmark of progress at the period at which it was written. The second consideration is the importance of showing the application of general principles to concrete situations, and the divergences of international practice resulting from the absence of an international court of appeal. For this purpose references are made to the leading cases decided in national courts, principally British and American, which illustrate the interpretation placed by their respective governments upon the rule of law governing the particular facts in hand. For the convenience of the student, these cases have been selected from the available collections of cases, chiefly Scott's *Cases on International Law* (edition of 1922), and Evans' *Leading Cases on International Law* (edition of 1922). In addition to the references in foot-notes to authorities which may be consulted by the student, a briefer list of select references is included at the close of the volume.

The difficult question as to the place to be assigned to the League of Nations in the general framework of international law has been met by taking the Covenant of the League as a legal document and discussing under separate headings the effect of its provisions upon the established rules of international law. Thus the organization and functions of the League are treated under a dozen or more chapter headings, while as a means of enabling the student to coördinate the different features of the League the text of the Covenant is printed in an appendix.

The author regrets that a less conspicuous place could not have been assigned to the laws of war and of neutrality, or that treatment of them might not have been omitted altogether as unworthy of scientific study. But until the prospect of war becomes more remote it seems impossible to omit discussion of those paradoxical rules which mark the failure of the community of nations to develop a more adequate system of law. If in the coming years their importance should be diminished or quite nullified, they will still remain as instructive lessons in the history of the slow progress of mankind from lower to higher forms of law.

Acknowledgment for help received is due in the first place to the standard treatises and texts, such as those of Hall, Oppenheim, Hershey, and others, which have put at the disposal of later writers a large body of material not otherwise available except at great cost of time. Moore's Digest is indispensable material for the American student, while Hyde's recent volumes have been of particular assistance in dealing with problems arising out of the World War. In addition the author is under special obligations to Professor Frederic A. Ogg, the general editor of the present series, who gave many helpful suggestions making for clearness and accuracy. Dr. James Brown Scott read the manuscript in full and contributed a small volume of criticisms and observations which have added materially to the value of the work. Professor Manley O. Hudson read the proofs and entered numerous corrections. The author regrets that the character of the volume did not permit him to adopt the suggestions of Professor Hudson with respect to a more logical classification of international "rights" in accordance with the newer theories of analytical and sociological jurisprudence. Professor Edwin M. Borchard read the chapters on maritime war and checked up a number of points needing restatement. Professor Quincy Wright went through the list of select references in Appendix C and suggested additional titles. In spite of such valuable assistance, however, the author is conscious that in dealing with so many controversial questions and with so much doubtful evidence there is much room for error, for which he alone is responsible.

C. G. F.

Bryn Mawr College,
Easter, 1924.

TABLE OF CONTENTS

PAGE

PREFACE v

LIST OF WORKS REFERRED TO xxv

TABLE OF CASES xxxv

PART I

THE SCIENCE OF INTERNATIONAL LAW

CHAPTER

I. THE HISTORICAL BACKGROUND OF INTERNATIONAL LAW

a. Tendencies in the development of international law . . 3
Law within the state 3
Corresponding need of law between states 3
Obstacles to the growth of law between states . . . 5
Historical roots of present law 6

b. International practice at successive periods. Oriental states 7
The Greek city-states 7
Arbitration among the Greeks 9
Rome as a city-state 10
The Jus Gentium of later Rome 11

c. The Holy Roman Empire 14
Influence of the Church 15
Influence of civil and canon law 16
Formation of national states 17

d. The Peace of Westphalia and the sovereignty of states . 19
Period between 1648 and 1713 20
Period from 1713 to the French Revolution 21
Period from 1789 to 1815 22

e. The Congress of Vienna and its aftermath 24
The Monroe Doctrine 26
Balance of power in the Near East 26
Balance of power in central and western Europe . . 27
Growth of new rules of law 27
Administrative unions 28

f. The development of law by collective action 28
The Hague Conference of 1899 28
The Conference of 1907 28
The Declaration of London 29

g. Effect of the World War 30

h. Covenant of the League of Nations 30
Changes in the structure of the international community 31
The Assembly of the League 32

II. THE NATURE AND SCOPE OF INTERNATIONAL LAW

a. Definition of international law 34
Relation of international law to ethics 34

CHAPTER PAGE

Distinction between universal and general international law . . . 35
International comity . . . 35
International administrative law . . . 36

b. Basis of international law . . . 37
Method of its enactment . . . 38
Method of its interpretation . . . 39
Method of its enforcement . . . 40

c. Is international law true law? The Austinian view . . . 40
The school of historical jurisprudence . . . 41

d. The scope of international law . . . 43
Subjects outside the law . . . 44

e. Law versus sovereignty . . . 44
Sovereignty versus collective responsibility . . . 46

f. Organization of the League of Nations . . . 46
Functions of the League . . . 47

III. The Development of the Science of International Law

a. Predecessors of Grotius . . . 50

b. The Grotian system . . . 51
Justification of the appeal to the natural law . . . 51

c. Schools of international law: the Naturalists . . . 53
The Grotian School. Vattel . . . 53
The Positivists . . . 55

d. Character of recent treatises: British . . . 56
American . . . 56
German . . . 58
Continental European and Latin American . . . 58

IV. The Determination of the Content of International Law

a. Sources of international law . . . 61
Custom as a source of international law . . . 61
Treaties as a source of international law . . . 63
Conventions of the Hague Peace Conferences . . . 64
Conventions relating to general interests . . . 65

b. Evidences of international law . . . 66
Works of publicists . . . 67
Decisions of international courts . . . 68
Decisions of national courts . . . 69
Factors influencing the development of international law . . . 71

c. Codification of international law . . . 72
Codification of rules in force . . . 72
Formulation of new rules . . . 73
Codification by general conventions: the Hague Conventions . . . 73
Conventions relating to general interests . . . 74
Unofficial codification . . . 74

V. The Relation of International Law to Municipal Law

a. Different spheres in which international law and municipal law operate . . . 76

b. Implied adoption of international law by municipal law . 76
Methods of enforcing international law . . . 77
Practice of Great Britain . . . 78
Practice of the United States . . . 79

PART II

THE PERSONS OF INTERNATIONAL LAW

CHAPTER PAGE

VI. MEMBERSHIP IN THE COMMUNITY OF NATIONS

a. The "Family of Nations" 83
Corporate character of international persons 84

b. Full membership in the international community . . . 86
Marks of full membership 86
Qualified full membership 87
Neutralized states 87
States admitted into the family of nations under conditions 90

c. Partial membership in the international community . . 93
Members of a confederation 94
Members of a federal state 95
Protectorates 96
Administered provinces 99
British self-governing dominions 99
Territories under mandate of the League of Nations . 100
Belligerent communities 101

VII. ACQUISITION OF MEMBERSHIP IN THE FAMILY OF NATIONS. CONTINUITY AND LOSS OF INTERNATIONAL PERSONALITY

a. Changing character of international persons 103

b. Acquisition of membership: recognition of new states . 103
Conditions attending recognition 104
Recognition of revolting territories 105
The "right of self-determination" 106
Conditions qualifying self-determination 107
Recognition of belligerency 108
Recognition of insurgency 110

c. Continuity of international personality 111
Recognition of de facto governments 112
Political considerations influencing non-recognition . 112
Effect of changes in population and territorial area . 115

d. Extinction or loss of international personality 116
Partial loss of personality 116

e. Succession of states 117
Universal succession 117
Partial succession 118
Rights and obligations of a new state 120
Status of inhabitants of transferred territory . . . 122

PART III

SUBSTANTIVE INTERNATIONAL LAW

VIII. THE RIGHTS OF INTERNATIONAL PERSONS

a. Character of international rights 125
Fundamental rights 125
Secondary rights 128
Perfect and imperfect rights 129

b. Rights not absolute, but relative 130

IX. THE EQUALITY OF INTERNATIONAL PERSONS

a. Equality a characteristic of international persons . . 132
Fundamental rights 132

CHAPTER PAGE

Rights of redress 133
Equal legal capacities and unequal physical capacities 134
Equality in respect to the adoption of new rules of law 134

b. Primacy of the Great Powers 135
Its legal effects 136
Procedure at the Hague Conferences 136
Inequality in relation to administrative agencies . . 137

c. Organization of the League of Nations: inequality in the Council 138
Equality in the Assembly 138
Jealous attitude of the smaller powers 139
Claims of the Great Powers 140
Value of the League compromise 140

X. The Right of Existence

a. Nature and scope of the right of existence 142
Theoretical and practical aspects 142

b. Self-defense against direct attack 143
German invasion of Belgium in 1914 145

c. Self-defense against indirect attack 145
Menace of armaments of neighboring states . . . 146
The balance of power 147
The Monroe Doctrine 147
Parallel doctrines of other states 150

d. Intervention: its legal basis 150
Intervention directed against revolutionary governments 151
The removal of an international nuisance 152
Self-defense against international outlawry 153
Intervention on "grounds of humanity" 154
Defense of national honor 155

e. The protection of citizens in foreign countries 156
Cases of mob violence 158
Injuries received during civil war 159
Cases involving contract rights 159
Intervention in connection with the Monroe Doctrine . 160

XI The Right of Independence: Jurisdiction over Persons

a. Nature of the right of independence 163
Distinction between external and internal independence 163
The scope of internal independence 164

b. Jurisdiction over citizens. The determination of citizenship 165
Citizenship by birth 165
Citizenship by naturalization 168
Conflicts of national claims: indelible allegiance . . 169
The "right" of expatriation 170
Loss of citizenship 172
Status of married women 173
Double allegiance: a problem of international reconstruction 175

c. Jurisdiction over aliens 175
The admission of aliens 175
The expulsion of aliens 178
Rights conceded to resident aliens 178
Comity in matters of jurisdiction 181
Scope of international private law 182

CHAPTER PAGE

d. Special exemptions from jurisdiction 183
Suits against foreign states 183
Suits involving property belonging to a foreign state . 184
Personal immunity of foreign sovereigns 185
Asylum in foreign legations 186
Exemption of aliens from local jurisdiction in non-Christian countries 188

XII. Jurisdiction over Public and Private Vessels

a. Jurisdiction outside territorial limits 190
b. The national character of merchant vessels 190
c. Jurisdiction over foreign merchant vessels in national ports 193
Matters relating to internal discipline 193
Civil suits against foreign vessels in port 195
Concurrent jurisdiction of several states 196
Jurisdiction over cases of collision on the high seas . 197
Jurisdiction in suits for salvage 198
Asylum on foreign merchant ships 199
d. Jurisdiction over public vessels 200
Exemption of public vessels from civil suit 201
Difficulties attending such exemption 202
e. Concurrent jurisdiction on the high seas 204
The suppression of piracy 204
Piracy and privateers 204
Status of vessels in the service of insurgents . . . 205
The suppression of the slave trade 206

XIII. Extradition of Fugitive Criminals

a. Legal basis upon which extradition rests 210
b. Conditions attached to treaties of extradition 211
Specified offenses 211
Necessity of trial for stipulated offenses 212
Extradition of citizens 212
Political offenses regularly excepted 214
c. Need of a uniform rule 215
d. Attempted extradition of the ex-Kaiser 216
e. Possibility of a general international convention . . . 217

XIV. The Right of Independence: Jurisdiction over Territory

a. Jurisdiction over territory as distinct from persons . . 219
Nature of territorial jurisdiction 219
Sovereignty and ownership 220
b. Acquisition of title to territory 221
Title by occupation 221
Conditions of occupation 223
Extent of the area of occupation 225
Colonial protectorates 228
Delimitation of the hinterland 228
c. Title by accretion 229
d. Title by prescription 230
Part played by prescription in international law . . 231
e. Title by cession 232
The plebiscite as a condition of transfer 234
Obstacles to the practical application of the doctrine . 238
Individual option of inhabitants 239

CHAPTER PAGE

Compulsory transfer under the treaty of Lausanne . 240
Property rights in transferred territories 241
f. Title by conquest 241
g. Leases 243

XV. Jurisdiction over Territory: National Boundaries
a. Sources of the law 245
b. Determination of boundary lines 245
"Natural" and artificial boundaries 246
c. The water divide as a boundary 247
d. Rivers as boundaries: the thalweg 247
Effect of erosion and evulsion 248
Dividing line upon bridges 249
e. Boundary straits and lakes 249
f. The maritime boundary: the marginal sea 250
The further extension of the marine league 252
Belligerent measures 253
Measures to prevent smuggling 254
Issues raised by the Eighteenth Amendment 255
g. Bays and gulfs 256
Prescriptive rights to territorial bays 257
Conventional agreements 258
h. Territorial straits 259

XVI. Restrictions upon Jurisdiction over Territory: Easements and Servitudes
a. Servitudes defined 261
Legal nature of servitudes 261
Customary and conventional servitudes 262
b. General servitudes: servitudes upon rivers 263
Provisions of the peace treaties of 1919 266
The flow of rivers 267
c. Bays and gulfs 268
Lakes and land-locked seas 269
The marginal sea 270
d. Straits and canals 271
The Dardanelles and the Bosphorus 271
The Straits Convention of 1923 273
Interoceanic canals 273
The Panama Canal 275
The Kiel Canal under the treaty of 1919 278
e. Land territory not subject to general servitudes . . . 278
f. Special servitudes 279
Positive servitudes: The North-Atlantic Coast Fisheries case 280
Railways 281
Rights of way 281
Negative servitudes 283
The Monroe Doctrine 284

XVII. Jurisdiction over the Air Above National Territory
a. The formulation of a law of aërial space 286
b. Jurisdiction over wireless messages 286
Administrative regulation of messages 287
c. Law of aërial navigation 287
The Aërial Navigation Convention of 1919 288

CHAPTER PAGE

XVIII. The High Seas

a. The high seas open to the use of all nations 291
Early claims to exclusive jurisdiction 291
Modern practice of states 293

b. The law of the sea 294
Regulations to prevent collisions 294

c. Regulation of fishing on the high seas 295
The Bering Sea Seal Fisheries case 295

d. Regulation of submarine cables 296

e. Freedom of the seas: in time of war 297
Freedom of the seas: political aspects 297
Freedom of the seas: as affected by naval armaments 298

XIX. The External Independence of States

a. Freedom in respect to foreign relations 300
Limitations imposed by unequal treaties 300
Restrictions imposed by treaties of peace 301

b. Objectives of foreign policy 302
National self-protection 303
The development of commerce 306
Competition for the supplies of the raw materials of industry 306
The struggle for foreign markets 307
Opportunities for the investment of capital . . . 308

c. Absence of a rule of law 308
Foreign policies towards China 309
Provisions of the Washington Conference 310
Concessions in Mexico 311

d. Tariffs and subsidies 312

e. Merchant marine and foreign policy 313

f. The system of mandates 314

g. Difficulties attending the adjustment of national commercial policies 314

XX. International Treaties

a. Treaties analogous to contracts under municipal law . 316
Treaties in lieu of legislation 316
Law-making treaties 317

b. Legal nature of treaties 318
Bilateral and limited multilateral treaties 319
Sanctions for the observance of treaties 320

c. Classification of treaties 320

d. Formation of treaties. Capacity of the parties . . . 321
Powers of state agents 323
Ratification of treaties 324
Ratification with reservations 325

e. Acceptance under duress 326
Duress in relation to good faith 327

f. Treaties in violation of international law 330
Treaties opposed to public morality 330

g. Interpretation of treaties 331
Intrinsic and extrinsic evidence 333
Most-favored-nation clauses 335

h. Effect of treaties upon third states 337
Remedial rights of third states 339

CHAPTER PAGE

i. Termination of treaties: performance 339
Expiration of treaties in accordance with terms . . 340
Dissolution by agreement 340
Dissolution by force of circumstances 341
Violation of treaty by one party 342
Treaties of guarantee 343

j. Effect of change of circumstances 344
Views of publicists 345
Instances of international practice 347
General conclusions 348

XXI. The Agents of International Intercourse

a. Historical origins of the law 350

b. Representative character of the head of the state . . 351
The secretary of foreign affairs 351

c. The "right of representation" 352
Case of two conflicting governments 353

d. Classification of diplomatic agents 354
Appointment of diplomatic representatives 356
Credentials of office 357

e. Functions of diplomatic agents 358
Relations with the foreign office 359
Restraints upon public ministers 359

f. Privileges and immunities of diplomatic agents . . . 360
Personal immunities 361
Exemption from criminal jurisdiction 361
Exemption from civil jurisdiction 362
Immunity of official residence 364
Exemption from taxation 364

g. Rights with respect to third states 366
Innocent passage in time of war 367

h. Termination of a diplomatic mission 368
Effect of revolution 368
Recall of offending minister 369
Dismissal of diplomatic agent 370
Breach of diplomatic relations 371

i. The consular service: origins 371
Legal status of consuls 372
Grades of consuls 373
Appointment and authorization of consuls 373
Functions of consuls 374
Privileges and immunities of consuls 375
Special status of consuls in the Orient 377

XXII. Remedial Rights

a. Remedial rights as distinct from antecedent 379
Remedial rights under municipal law 379
Absence of international agencies of redress . . . 380

b. The right of self-help 381
Restraints upon self-help 382
Gravity of particular wrongs 382
Just causes of war 383

c. Pacific measures of redress 384

d. Form of redress 385

CHAPTER PAGE

XXIII. The Responsibility of International Persons

a. Limitations of state responsibility 386

b. States directly responsible for acts of their governments 387
Acts of subordinate officers 387
Qualifications due to constitutional government . . 388

c. Responsibility for acts of citizens 390
Acts committed against foreign states 390
Acts committed against resident aliens 391
Occasions of mob violence 392

d. Responsibility arising from civil war 393
The Calvo Doctrine 394
Exceptional instances of enforced responsibility . . 394
Responsibility arising from international war . . . 395

PART IV

INTERNATIONAL PROCEDURE FOR THE PROTECTION OF RIGHTS

XXIV. Peaceful Procedure

a. International procedure in general 399

b. Negotiation 399

c. Good offices and mediation 400
Semi-legal character of mediation 402

d. Arbitration 403
Free choice of judges 403
Basis of the arbitral decision 404
Legal obligation to submit to the award 405

e. Development of the obligation to arbitrate 406
General arbitration treaties 407
Exceptions and qualifications 407
Disputes involving contract debts 409
Obligations under the Covenant of the League of Nations 409

f. The Hague Permanent Court of Arbitration 409
Judicial settlement versus arbitration 410
The Judicial Arbitration Court 411
The International Prize Court 412

g. The Permanent Court of International Justice . . . 412
The statute of the court 413

h. Commissions of Inquiry 414
Provisions of the Hague Convention 415
The Treaties for the Advancement of Peace . . . 416
Provisions of the Covenant of the League of Nations . 417

i. Technical distinctions 418

XXV. Forcible Procedure by Methods Falling Short of War

a. Legal status of such procedure 420

b. Retorsion 420

c. Reprisals: earlier forms 421
The modern practice 421

d. Embargo 422
Seizure of vessels on the high seas 423
Suspension of treaties 423

CHAPTER PAGE

e. Pacific blockade 424
Its effect upon the commerce of third states . . . 425

f. Other forcible measures of redress 426

g. Rupture of diplomatic relations 427

XXVI. Forcible Procedure by War

a. Character of war as a legal remedy 428
The right to make war 428
War as a procedure and war as a legal relation . . . 428
The "laws of war" 429
Civil war 431
Sources of the law of war 432
Sanctions of the laws of war 433

b. Fundamental principles of warfare 434
Limits to the use of force 434
Absolute and conditional prohibitions 435
The law of necessity 435
Conflicting views of "humane conduct" 436
Combatants and non-combatants 437
Changed conditions of modern warfare 438

XXVII. Effect of War upon the Normal Relations of the Belligerent States

a. Rupture of diplomatic relations 440

b. Effect of war upon treaties 440
Executed treaties 441
Political treaties: international conventions 442
Treaties contemplating temporary arrangements . . 442

c. Enemy public property 444

d. Status of resident enemy aliens 445
Expulsion of enemy aliens 445
Freedom of departure 446
Access to the courts 447
Property of enemy aliens 448

e. Status of enemy merchantmen in port 450
Practice during the World War 452

f. Commercial intercourse between enemy citizens . . . 453
Test of enemy character 454
Contracts between enemy citizens 455

g. Obligation to give warning before commencing hostilities 456
Modern declarations of war 457
The Hague Convention of 1907 457

XXVIII. The Laws of Land Warfare

a. Lawful combatants 460
Provisions of the Hague conventions 461
Status of war rebels 462

b. Instruments of warfare 463
Prohibitions adopted at the Hague conferences . . 464
Practice during the World War 465
The Washington treaty of 1922 466

c. Methods of warfare: obligation to give quarter . . . 466
Use of deceit 467
Spying 468
War treason 469

CHAPTER PAGE

d. Treatment of prisoners of war 470
Provisions of the Hague Regulations 470
Practice during the World War 471
The sick and wounded 472

e. Methods involving non-combatants: sieges and bombardments 473
Seizure and destruction of property; pillage and devastation 475
Military objectives other than direct hostilities . . . 476
Intimidation of the civilian population 477

f. Military occupation 477
When occupation begins 478
Scope of authority of the military occupant . . . 479
Restrictions imposed upon the military occupant . . 480
Requisitions 482

g. Intercourse between belligerents: indirect communication 484
Direct intercourse 484
Agreements between belligerents 485
Armistices 487
The armistice of November 11, 1918 489

h. Reprisals as a sanction against unlawful conduct . . . 489

XXIX. The Laws of Maritime Warfare

a. General aspects of the laws of maritime warfare . . . 492

b. Lawful combatants: privateers 493
Conversion of merchant ships into warships . . . 494
Status of armed merchant ships 495
Defensive armament and the submarine 497
Status of officers and crew of captured vessels . . . 498

c. Instruments of maritime warfare: automatic contact mines 499
Practice during the World War 500

d. Methods of maritime warfare 501
Treatment of prisoners 502
Bombardment of coast towns 503
Blockade of enemy country 505

e. Capture of private property 505
Exception in favor of enemy vessels in port . . . 506
Exemption of fishing vessels 507
Postal correspondence of belligerents 507
Enemy goods found on neutral vessels 508
The test of enemy character 508

f. Visit and search of vessels 511

g. Conditions justifying the attack and destruction of merchant vessels 511
Questions presented during the World War: submarine warfare 512

h. Status of armed merchant ships 514
Position taken by the United States 514

i. Status of unarmed merchant ships 515
Case of the *Lusitania* 515
Rights of passengers and crew 516

j. Outlawry of submarines as commerce destroyers . . . 517

XXX. The Relation of Neutral States to Belligerents

a. General principles of neutrality: neutral rights . . . 519
Belligerent rights 519

CHAPTER PAGE

b. Conflict between neutral and belligerent rights . . . 520
Increasing regard for neutral rights 521

c. Present state of the law 521

d. Neutrality under the Covenant of the League of Nations 522

XXXI. Neutral Rights

a. Inviolability of neutral territory 524
Violations of neutral territory in self-defense . . . 525
Cases during the World War 526

b. Acts short of hostilities 526
Case of the *Appam* 527

c. Right of neutral state to protect its citizens and their property 528
Liability of neutral aliens to military service . . . 528
Belligerent right of angary 529
Requisition of Dutch merchant vessels in 1918 . . . 531

d. Acts forfeiting neutral status 532
Neutral persons on belligerent merchant ships . . . 532
Neutral goods on belligerent ships 532
Transfer of belligerent vessels to neutral flag . . . 534

XXXII. Conflict of Neutral Rights of Trade with the Belligerent Right to Maintain Blockade and to Capture Contraband

a. Opposing doctrines of blockade 537
Scope of a blockade 537
Effectiveness of blockade 538
Place of seizure 539

b. Doctrines of "continuous voyage" and "ultimate destination" 540
Rationing of neutral countries 542

c. What is contraband 543
Opposing doctrines 543
The question of destination 544
Rationing of neutral countries 547

d. Penalty for carriage of contraband 547

e. Unneutral service 548
Reservists during the World War 549
The Rule of 1756 549

f. Visit and search 550
Convoy 550

g. Destruction of neutral prizes 551

h. Prize courts 552
The International Prize Court of 1907 553

XXXIII. Neutral Duties

a. Duty of abstention 554
Commercial relations between neutral and belligerent states 554
Acts of courtesy 555

b. Duties of prevention 555
Acts of the belligerents themselves 556
Measures short of actual hostilities 556

c. Permissible use of neutral ports 557
Restrictions imposed: stay in port 557

CHAPTER PAGE

Food and fuel 558
Internment of prize ships 558
d. Status of armed merchant ships 559
e. Acts of individuals in violation of neutrality 560
Scope of neutral duty in this field 560
f. Neutrality laws 561
Accepting a commission 562
Enlisting recruits 562
Hostile expeditions from neutral ports 563
g. Permissible acts of individuals 565
Loans to belligerents 566
Sale of munitions of war 567

XXXIV. Aërial Warfare

a. Air-ships legitimate combatants 570
Bombardment by air-ships 570
Aërial raids 571
b. Neutral territorial rights 571
Character of hydro-aëroplanes 572
c. Draft code of aërial warfare 572

XXXV. The Termination of War

a. Different methods of termination 574
Subjugation 574
Simple cessation of hostilities 575
Unilateral termination of war 575
b. Treaties of peace 575
Relation of final to preliminary treaty 576
c. Effects of the termination of war 576
Jus postliminii 577
Amnesty 578
d. New rules of responsibility 579

Appendix A. The Covenant of the League Nations 581

Appendix B. The Statute of the Permanent Court of International Justice 592

Appendix C. Select References 601

Index 625

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This is not a bibliography of the subject, being limited to works appearing in foot-notes in the text. For a list of Select References, see Appendix C.

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TABLE OF CASES

Acteon, The .....551, n. 2
Adula, The 539
Alabama Claims (Geneva Arbitration) .....564, n. 2
Alfred Nobel, The .....546, n. 5
Alleganean, The 257
Ambrose Light, The 206
Anna, The 230
Anémone, The .....193, n. 5
Antelope, The 134; 207
Appam, The 527
Ariel, The .....534, n. 5
Arkansas v. Tennessee .....248, n. 4
Atalanta, The 197; 548
Attualita, The .....202, n. 3

Baiz, In re 376
Bartram v. Robertson 336
Benson v. McMahon .....211, n. 1
Belgenland, The 197
Benito Estenger, The 534
Berg v. B. and A. Steam Navigation Co. .....528, n. 1
Bering Sea Seal Fisheries Arbitration 295
Bermuda, The 545
Betsey, The 538
Bjornsterjne Bjornson .....546, n. 5
Boedes Lust, The 422
Boffalo Case .....178, n. 3
Brindilla, The .....535, n. 6
Brown v. United States 448
Buena Ventura, The 451
Bundesrath, The 545
Buvot v. Barbuit..78; 365; 375, n. 3

Carlisle v. United States....180, n. 3
Carrington v. Merchants' Ins. Co. .....547, n. 4
Casablanca Case .....375, n. 2
Castioni, In re 214
Chamizal Boundary Case 248
Charkieh, The .....96; 353, n. 4
Charlton v. Kelly 213; 343
Charming Betsy, The. See Murray v.
Chicago v. Sturges .....482, n. 3
Church v. Hubbart 254
Circassian, The .....539, n. 4
Commercen, The 544
Constitution, The 201
Costa Rica Packet, The.....389, n. 1
Creole, The 195
Cunard Steamship Co. v. Mellon 36, n. 1; 191, n. 3; 194; 201, n. 2; 251, n. 1.

Dacia, The 535
Dainese v. Hale 196
Darby v. The Brig Erstern ..550 n. 2
De Haber v. Queen of Portugal 183; 184
De Jager v. Attorney General of Natal .....180, n. 4
De Wutz v. Hendricks 566
Direct United States Cable Co. v. Anglo-American Telegraph Co. 258
Dogger Bank Case 415
Dolphin, The 545

Eliza Ann, The .....324, n. 2
Ellis v. Mitchell 196
Emanuel, The .....550, n. 2
Exchange v. McFaddon. See Schooner Exchange.

Fairfax's Devisee v. Hunter's Lessee .....179, n. 3
Fanny, The 534
Federico, The 549
Felicity, The .....551, n. 2
Fenix, The 452
Flad Oyen 552
Franciska, The 538
Frau Houwina .....540, n. 2
Friendship, The 548
Fridland, The .....546, n. 5

General Armstrong, The 525
Georgia, The .....535, n. 1
Grace and Ruby, The 256
Griswold v. Waddington 455

Haabet, The .....547, n. 5
Handly's Lessee v. Anthony.248, n. 4
Hanger v. Abbott.....447, n. 6; 455
Harmony, The 510
Hassard v. United States of Mexico .....184, n. 1
Haver v. Yaker 325
Heathfield v. Chilton 365
Henry L. Marshall, The.....256, n. 5
Hilton v. Guyot....36, n. 1; 181; 182
Hoop, The .....447, n. 5; 454
Hudson v. Guestier .....255, n. 1

Immanuel, The .....550, n. 2
Indian Chief .....510, n. 4
Indiana v. Kentucky .....248, n. 4
Ionian Ships, The. See The Leucade.
Iowa v. Illinois .....248, n. 4
Itata, The 111; 252

Japanese House Tax Case..... 334
Johann Friederich 198
Johnson and Graham's Lessee v. McIntosh 223
Jonge Margaretha 544

Kansas v. Colorado .....268, n. 1
Keith v. Clark .....115, n. 4
Kennett v. Chambers 567
Kentucky v. Dennison .....217, n. 3
Kershaw v. Kelsey 455
Kim, The 546
Kingdom of Roumania v. Guaranty Trust Co. .....184, n. 1
Knight Commander, The 551

Le Hardy v. La Voltigeante 510
Leucade, The 98
Louis, Le 135; 207
Louisiana v. Mississippi.....248, n. 4

Macartney v. Garbutt 365
MacDonald's Case .....169, n. 3
Mackenzie v. Hare .....174, n. 1
Magdalena Steam Navigation Co. v. Martin 363
Magellan Pirates, The 205
Mali v. Keeper of the Common Jail. See Wildenhus' Case.
Manouba, The 549
Maria, The .....69; 550; 552, n. 4
Marianna Flora, The 204
Mason v. Le Blaireau .....198, n. 4
Mentor, The .....577, n. 3
Meunier, In re 214
Mighell v. Sultan of Johore 186
Minnesota v. Wisconsin .....248, n. 4
Miramichi, The .....548, n. 2
Montezuma, The 206
Mortensen v. Peters 258
Moewe, The 452
Murray v. Schooner Charming Betsy 79; 510

Nashimura Ekiu v. United States 176, n. 1
Nationality Decrees issued in Tunis and Morocco, Advisory Opinion on ....167, n. 2; 348, n. 4
Nebraska v. Iowa .....248, n. 4
Neptunus, The 539
Nereide, The 79; 496; 533; 534
Neutralitet, The .....547, n. 4
New Chili Gold Mining Co. v. Blanco 367
New York Life Insurance Co. v. Statham 455
Newton, The 193
North Atlantic Fisheries Arbitration 262; 280
Noydt Gedacht, The 534

Oetjen v. Central Leather Co.... 112
Olinde Rodriguez, The 538
Orozembo, The 548

Panaghia Rhomba, The.....540, n. 1
Paquete Habana, The 36, n. 1; 62, n. 1; 68; 79; 507
Parkinson v. Potter.....364; 365
Parlement Belge, The 202
Pearl, The 545
Pedro, The 509
Perkeo, The 452
Pesaro, The 202
Peterhoff, The .....538, n. 1; 543, n. 3; 545; 547, n. 2
Petrolite, The .....535, n. 6
Pious Fund of the Californias Case 118
Platuria, The .....535, n. 6
Polish Minorities Treaty, Advisory Opinion on certain questions arising out of .....164, n. 4
Porter v. Freudenberg 448
Porto Alexandre, The 202
Prometheus, The .....42, n. 2

Queen v. Keyn 78; 251

Rapid, The 454
Recovery, The 69
Regina v. Anderson 196
Regina v. Lesley 197
Reliance, The 198
Respublica v. De Longchamps 361, n. 1
Rhode Island v. Massachusetts.. 232
Rose v. Himley 254
Roseric, The .....202, n. 3

Sally, The 193
Sally, The .....511; 548, n. 2
Sambiaggio Case .....394, n. 4
Santissima Trinidad, The...564, n. 1
Sarah Christina, The .....547, n. 6
Savarkar Case .....211, n. 2
Schooner Exchange v. McFaddon .....195, n. 1; 201
Scotia, The..135; 197; 199; 295, n. 1

Settlers of German Origin in Poland, Advisory Opinion on certain questions relating to..122, n. 3
Shanks v. Dupont .....170, n. 2; 173
South American Steamship Co. v. United States .....252, n. 1
Society for the Propagation of the Gospel v. New Haven 440
South African Republic v. Compagnie Franco-Belge .....184, n. 1
Springbok, The 540
Stephen Hart, The 545
Strousberg v. Republic of Costa Rica .....184, n. 1
Sutton v. Sutton 441

Tacna-Arica Case (Peru-Chili) 328, n. 4
Taylor v. Best 363
Taylor v. Morton .....77, n. 1
Tempest, The .....193, n. 6
Terlinden v. Ames ....116, 117, n. 3
Texas, State of, v. White.....95, n. 4
Thirty Hogsheads of Sugar v. Boyle 69
Three Friends, The 110
Tomako, The .....256, n. 5
Triquet v. Bath 78; 365
Two Friends, The 198
Tinos, The .....526, n. 2

United States v. Bennett 196
United States v. Hart .....565, n. 1
United States v. Jeffers ....187, n. 1
United States v. Ortega....361, n. 3
United States v. Prioleau 118, n. 1; 119
United States v. Rauscher 212
United States v. Rice.....242, n. 2
United States v. Rodgers 191, n. 2; 269
United States v. Smith 205
United States v. Smith .....119, n. 2
United States v. Trumbull 111, n. 1; 252, n. 2
United States v. Wiborg ...565, n. 1
United States v. Winans...280, n. 8
United States v. Wong Kim Ark 165, n. 4

Vavasseur v. Krupp 184
Venus, The 510
Venezuelan Preferential Case 425, n. 5
Virginia v. Tennessee .....232, n. 1
Viveash v. Becker 375

Washington v. Oregon.....248, n. 4
Wells v. Williams .....447, n. 4
West Rand Central Gold Mining Co. v. The King 78; 120
Whitney v. Robertson...77, n. 1; 335
Wildenhus' Case 193; 194
William, The 550
Williams' Case.....169, n. 4; 562
Wilson v. Blanco 366
Wimbledon, The .....278, n. 6
Wolff v. Oxholm 449
Wren, The .....540, n. 1
Wyoming v. Colorado .....268, n. 1

Young Jacob and Johanna, The 507, n. 2

Zamora, The .....530; 531, n. 1

PART I

THE SCIENCE OF INTERNATIONAL LAW

INTERNATIONAL LAW

CHAPTER I

THE HISTORICAL BACKGROUND OF INTERNATIONAL LAW

a. Tendencies in the development of international law: law within the state

From the dawn of history the natural instincts of men have led them to associate with one another in groups of varying size and structure. By successive stages of family or horde, clan, tribe, and nation these groups enlarged in range and functions until they have brought us to the complex organization of the modern state. Throughout its later development the dominant characteristic of the state has been the presence of a rule of conduct governing the conflicts of individual claims, protecting the rights of the members of the community, and prescribing their respective duties. The substance of this rule of conduct has been the sense of justice prevailing at a given time within the community, whether expressed by custom and tradition or by specific enactments of kings or assemblies. Supplementing this standard of justice as the arbiter of conflicting claims came, by slower and later development, a body of rules looking to the furtherance of the common interests of the whole group. The public welfare came to be recognized as an object of coöperative effort, partly in the form of security against attacks from without the state, and partly in the form of an increase in the moral and material prosperity of the group.

Implications of municipal law

The law of the state thus represents, in its more modern forms, the recognition by the citizen body of the necessity of applying to the disputes of individuals the collective judgment of the community expressed through the decisions of its judicial tribunals. The rights thus recognized are protected by the collective power of the community, put into effect by the designated executive agencies. Within the prescribed sphere of its operation, the will of the group dominates over the will of the individual citizen. Furthermore, in matters regarded as of common interest to the whole group, law represents measures to which the individual must give his support in expectation of advantages accruing to the state as a whole, whether indirectly beneficial to each citizen personally or merely to a majority of the community.

Corresponding need of law between states

But the forces creating the necessity of law as a basis of peaceful contact and profitable intercourse between citizen and citizen

CHAP. I

did not bring the same pressure to bear upon states to establish a similar rule of conduct between their corporate groups. For many centuries man did not find it necessary to go outside the narrow circle of his local community to satisfy his desire for the material goods of life or for the higher intercourse of mind and heart. Nevertheless, contacts between neighboring states became in time inevitable, and the resulting conflicts of claims called for a principle or rule of justice by which they might be peaceably settled. That this principle or rule of justice should be that which had already been accepted as the basis of law between citizen and citizen was but the logical reaction of men to the new conditions with which they were faced.

The earliest appearances of international law were thus in the form of an application to states as composite persons of the same fundamental principles of conduct which, whether recognized as coming from divine or from human sources, constituted the standard of justice within the state itself. As time went on these principles of conduct became more and more definite, until it became possible to invoke them not as individual inferences from an abstract law, but as concrete rules of present legal right. The first stage of international law had begun.

Realization of common interests

Following upon the recognition of the need of a law governing the conflicts of claims between state and state came the recognition of the existence of a body of common interests between the several corporate groups. Commercial intercourse not only cut across the borders of neighboring communities, but established relationships between the members of states widely separated from one another. The existence of a common religious faith formed for a time a body of spiritual interests transcending national boundaries within the European circle. Commerce extended its ramifications, and the development of the arts and sciences created new fields of common thought and action. A sense of unity, of collective responsibility, of international solidarity began to be realized, and such terms as "society of nations" and "family of nations" emerged from the study of the philosopher and became the accepted usage of official relations. With the invention of modern means of transportation and communication, the body of moral and material interests common to the states of Europe and of the world at large reached such proportions that joint regulations and agencies of administration were seen to be necessary to provide for their protection and promotion. International law thus entered upon its second stage.

Obstacles to the growth of law between states

Offsetting these forces making for the adoption of a law between states were others that retarded its development. On account of the corporate character of the state, its interests were usually identified with those of the ruler or ruling class in control of the government. The king was, in most cases, the keeper of the conscience of the community. His personal sense of justice and his personal conception of the welfare of the community dictated the relations of the state toward other states. More than once when the sense of justice of neighboring communities and the realization of their common interests gave promise of the adoption of a common rule of law, the ambitions and rivalries of ruling dynasties created an artificial division between them.

Even in more modern times, with the general establishment of constitutional democracies, governments have tended to emphasize the divergent interests of their several states rather than the larger and more important interests that they have in common. In this they have, on the whole, been supported by the citizen body, partly owing to suspicion and distrust created by ignorance of conditions in foreign countries, and partly owing to the strong sense of nationalism developed by the wars and persecutions of the past. Setting aside the persistent element of human selfishness, which is an obstacle to municipal no less than to international law, the very size and complexity of the modern state has made it difficult for the individual to form a just view of the conduct of his government in the case in hand. Besides this, there are the artificial conditions of state life which act as a barrier to closer union. State boundaries have cut across the natural lines of human association and divided where they should have united. The heterogeneous character of modern states, large and small, advanced and backward in civilization, has added to the difficulty of reaching a common judgment of the whole body.[1]

Tendencies in its development

The development of international law has thus been marked by the interaction of unifying and separatist tendencies among the nations; and while that law has proceeded, on the whole, in the direction of a stronger and more comprehensive rule of conduct, it has lagged behind the municipal law of the more highly civilized states. On the one hand, its progress as a system of law has been

[1] As a matter of fact, the development of international law has been for the most part dictated by a small group of the leading powers, from eight to twelve in number, whose rivalries have occupied the center of the political stage and largely contributed to the difficulty of organizing the public opinion of the nations at large.

CHAP. I

governed by the standards of justice and morality prevailing at a given time within the several states,[1] and by the degree to which governments have been willing to apply those standards to their foreign as well as to their domestic affairs. On the other hand, the scope of the law has steadily widened, keeping pace in this respect with the growing realization of states that in one field after another coöperation has promised greater advantages than has individual action, and the common interests of their collective body have been of greater importance than their mutual differences.[2]

Historical roots of present law

Like the common law of England and the United States, the international law of the present day is in large part a product, not of formal and conscious enactment, but of gradual development from usage and custom. While its general principles transcend particular periods of history, its specific rules are closely interwoven with the political and economic conditions of the past. The conditions of one generation have given rise to practices which have persisted in a later generation when the original ground for them had disappeared.[3] Claims have been made by individual states upon the basis of long-continued usage, when the acknowledged interest of the international community called for their repudiation. Moreover, the technical terminology of international law became associated with the political thought of the period of its origin and has remained at a later day to support contentions inconsistent with the facts of the times.[4] In consequence, it is necessary at almost every stage of the study of international law to consider the historical associations under which specific rules have grown up and the extent to which particular conditions determined the reason of the rule or only its temporary form. It is with this object in view that the following brief sketch of the development of international law is presented.

Modern discoveries of records of the ancient empires of the

[1] See Oppenheim, *International Law*, I, § 51.

[2] The development of the underlying principles of international law is surveyed by J. B. Scott in *The American Institute of International Law: Its Declaration of the Rights and Duties of Nations*, pp. 1-49, and by J. S. Reeves, in *Round Table Conferences of the Institute of Politics at its First Session, 1921*. See also Vinogradoff, *Historical Jurisprudence, passim*. The analogy between national and international law is impressively set forth by Grotius, *De Jure Belli et Pacis* (Eng. trans.), Prolegomena.

[3] For one instance out of many, see the rules of neutrality with respect to shipments of arms by neutral citizens to belligerent states. Below, p. 567.

[4] As, for example, the terms "sovereignty," "semi-sovereign state." See below, pp. 44, 93.

b. International practice at successive periods: Oriental states

East have led us to correct our ideas of the complete isolation of those states, and have shown us that they maintained at times relations of friendly commercial intercourse. Treaties between the Egyptian Pharaohs and neighboring kings, entered into as far back as the fourteenth century B.C., provided for the recognition of their mutual sovereignty and equality, as well as for the extradition of political refugees and immigrants. But the relations thus established were limited to the countries involved and were not general among a group of states.[1] Treaties were similarly entered into by David and Solomon and later Hebrew kings with neighboring states, other than the seven nations marked for extermination, and instances are to be found showing a care for the faith of treaties and a recognition of the sanctity of the ambassadorial character; but again no general law was contemplated.[2] Apart from these and other relations between state and state, there are a few evidences of the recognition of a higher moral law restraining on occasion the ruthlessness with which war was generally waged. The Indian Code of Manu, about 500 B.C., prescribed humane treatment of prisoners and non-combatants and forbade the use of poisoned weapons and other excesses of warfare.[3] But for the most part war was waged with relentless cruelty by Assyrians and Babylonians, Medes and Persians, Phenicians and Carthaginians; and even the Jews, in spite of the ideals of peace proclaimed by their prophets, rivaled their neighbors in slaughter and extermination of the enemy.[4]

The Greek city-states

It was among the Greek city-states that the first consciousness of a community of interests developed, and with it a rudimentary form of international law. Within the narrow circle of the Hellenic world city-state met city-state upon a basis of mutual recognition of independence and legal equality, modified, as in the world of nations to-day, by alliances of separate groups, by religious and political leagues, and by the hegemony of successive individual states. A firm foundation for union was to be found in their common race, religion, language, and customs—bonds which

[1] The original document of a treaty between Egypt and the Hittites may be found in Breasted, *Ancient Records of Egypt*, III, 163 ff.

[2] See Walker, *History of the Law of Nations*, 31-36.

[3] See Burnell and Hopkins, *The Ordinances of Manu*, Lecture VII.

[4] For the war practices of the Hebrews, see Judges, Samuel, Kings, and other books of the Old Testament, *passim*. Also H. J. Cadbury, *National Ideals of the Old Testament*; J. M. P. Smith, *Religious Life of the Hebrews*. See also "War" in *Dictionary of the Bible*, IV, 892 ff.; "War and War Gods," in Hastings, *Encyclopedia of Religion and Ethics*, XII, 691 ff.

CHAP. I

were, however, greatly restricted in their power for the creation of an effective international law in consequence of the strong sense of individuality developed by the separate states, and by the ambitions which led Sparta and Athens each in its turn to strive for a position of leadership over the other states.

"Laws of the Hellenes"

Amid these more favorable conditions a series of laws known as "the laws (or customs) of the Hellenes" grew up between the several states. These laws consisted partly of customs based upon "natural" or universal law and partly of express conventions between separate states. The former were derived from "a natural and universal principle of right and wrong, independent of any mutual intercourse or compact," which Aristotle observed to be recognized by all men.[1] Their sanction was a religious one, in so far as the universal dictates of reason might be looked upon as having their origin in the will of the gods. Inasmuch, however, as the principles of the universal law were in many instances repudiated in actual practice and also, being conditioned by the ideals of the times, permitted practices revolting to modern conceptions of humanitarian conduct, many writers have refused to find in them any evidences of an international law.[2] On the other hand there was an elaborate system of treaty law based upon express compacts between the separate Greek states. The sanction of these conventions was the rule of good faith, which was itself part of the universal law. Their subject-matter included many rules of the universal law, which thus acquired a more definite character, as well as a wide range of rules which in modern times have become incorporated in the customary law.[3]

Position of aliens and ambassadors

Owing to the peculiar city-state organization of ancient Greece, the system of international law there developed bears a closer relation to our modern system than does the international law of any subsequent period down to the year 1648. We find a highly developed law regulating the position of aliens, whose rights were based partly upon the universal law of hospitality and partly upon convention, some treaties going so far as to provide for reciprocal civil and political rights, although in most cases the resident alien could exercise his rights only through the intermediation of a patron. In earlier times naturalization was refused, but there

[1] See Phillipson, *International Law and Custom of Ancient Greece and Rome*, I, 53.

[2] Kent, Laurent, Wheaton, and others; quoted by Phillipson, *op. cit.*, I, 47, 48.

[3] Phillipson, *op. cit.*, I, 382.

were gradual relaxations, particularly on the part of Athens, which undertook on several occasions to naturalize aliens en masse.[1] The right of asylum was regarded as of divine origin, and was particularly sacred in connection with Greek temples. Ambassadors were exceptionally privileged. Independent states enjoyed by treaty the right to send ambassadors and were in turn obliged to receive them from other states. Elaborate formalities attended their reception; their persons were regarded as inviolable, and severe punishment was meted out to those who maltreated them; an offense against them was regarded as a ground of war unless due reparation was made. To a certain extent they enjoyed the privilege of exterritoriality, being amenable for offenses not to the local jurisdiction but to their own national tribunals. The rules relating to the negotiation and interpretation of treaties show many parallels with the modern law, particularly in respect to the conditions under which a treaty could be broken.[2]

Arbitration among the Greeks

In addition to these rules of the substantive law there were numerous treaties providing for the settlement of interstate disputes by arbitration. The modern *compromis*, an agreement in advance to submit disputes of a definite or general character to arbitration, is to be found both in treaties of peace and in alliances between separate states. For example the second treaty of alliance between Sparta and Argos in 418 B.C. stipulated that they should submit their differences to arbitration "on fair and equal terms, according to their ancestral customs."[3] Moreover, arbitration was actually resorted to on a number of occasions, and important questions relating to the possession of territory, boundary-lines, and commercial and religious rights were submitted to judicial decision.[4] There was no hesitation, apparently, in submitting to arbitration disputes of a character which in modern times would be regarded as affecting national honor or vital interests, although account must be taken of the fact that in times of tension the agreement to acquiesce in an appeal to arbitral settlement was not faithfully kept.[5]

Methods of warfare

In contrast with the law of peace it must be pointed out that the Greek methods of warfare, though less unrestrained than those which prevailed among the Eastern empires, are revolting to

[1] Phillipson, *op. cit.*, Chaps. VII, VIII.
[2] *Ibid.*, Chaps. XIII-XV.
[3] Thucydides, V, 79; quoted in full by Phillipson, *op. cit.*, II, 61, 62.
[4] Examples are cited by Phillipson, *op. cit.*, II, 138-151.
[5] See Tod, *Greek International Arbitration*, Chap. II.

CHAP. I

modern conceptions of humanitarian conduct. The universal law, supported by specific treaties, prescribed many rules in mitigation of the severity of interstate conflicts. Formalities attended the declaration of war, with the object of inducing or permitting the offending party to submit to the demands for redress made upon it. Reprisals were regulated. Temples and embassies were regarded as inviolable. It was forbidden to kill prisoners, and provision was made for their ransom and exchange; truces and armistices were regarded as sacredly binding; permission was given for the burial of the dead; treachery was condemned, and poisoned weapons, as well as the poisoning of wells, were forbidden.

But in actual practice the Greeks frequently threw off all restraint. State policy as well as imminent military necessity frequently were made to justify treachery and cruelty of the most shocking character. The deliberate massacre by the Lacedæmonians of the Platæan garrison that had capitulated is a classic instance.[1] At times the entire male population of a captured city was put to the sword, and the women and children sold into slavery. Moreover, the doctrine of reprisals, so familiar as an excuse for the violation of the laws of war down to the latest times, was frequently made the ground for barbarous acts in flagrant contravention of the higher law acknowledged in principle by the perpetrators of the deed.[2]

Toward those outside the Hellenic circle the Greeks felt themselves bound only by the more obvious rules of the universal law. "The law of all mankind" was regarded as applicable to men as men, apart from race or religion. Its precepts, embodied like the law of the Hellenes in traditional usages, included the inviolability of the ambassadorial character and the obligation of treaties made under oath; but it is a question whether these rules were not as often violated as observed. A recognition of their existence is to be seen in the rebuke administered by Xerxes to those who suggested that he should retaliate upon the Athenians and the Spartans for the murder of the Persian envoys. His reply was that they had violated the law of all mankind and he would not do that very thing which he blamed in them.[3]

Rome as a city-state

Considered with respect to the development of rules of international law, the history of Rome may be divided into two periods.

[1] Thucydides, III, 52 ff.
[2] See, in general, Phillipson, *op. cit.*, II, Chap. XXIV.
[3] Herodotus, VII, 136; quoted by Phillipson, *op. cit.*, I, 60.

In the first, Rome was a city-state among other city-states, and its relations with them bear a close comparison with those of the Greek city-states. Down to the beginning of the third century B.C. Rome recognized the existence of other independent communities and maintained relations with them on the basis of formal treaties of alliance. While she dominated her Latin and Italian allies and subsequently absorbed them, she nevertheless regarded herself bound by legal obligations toward them. The institution of the public host, the provisions for naturalization, the extradition of fugitives, the inviolability of ambassadors, the faith of treaties and the formalities attending their negotiation, as well as fixed rules of warfare attest to the possession by Rome of a sense of legal rights and duties existing in a community of distinct juridical units.[1]

After the Second Punic War, however, Rome entered upon a phase of her history during which she proclaimed herself mistress of the world and denied even a theoretical independence and equality on the part of other states. Law now had its origin not in customs or in treaties but in the will of the dominant state. Hence it is impossible to speak from this time on of a true international law. Such law as there was might, however, be called the constitutional law of a world empire; for the system of colonial government applied by Rome to the provinces was by no means an arbitrary one; while the states not formally within the empire were, though subject to Rome, sufficiently autonomous to enjoy their own laws and civil government. Cicero even fancied he saw a *civitas gentium*, a community of states, existing as late as his day.

The *Jus gentium* of later Rome

But if Rome, by dominating the world, prevented the adoption of a true international law, she created through her jurists a system of law which was of the highest value in reëstablishing international law at a later period. The civil law of Rome applied to citizens only. Foreigners, who came in large numbers to Rome when the Italian tribes were being absorbed, were subject to the jurisdiction of the *prætor peregrinus*, and disputes between them, as well as disputes between foreigners and Romans, were settled by the application of the common elements of justice to be found in the customs and usages of the various tribes.[2] A law common to all nations, a *jus gentium*, was thus developed and was in its origin

[1] Phillipson, *op. cit.*, I, 107-108. The author contests the views of those who hold that Rome recognized no such rights and obligations.

[2] Maine, *Ancient Law*, Pollock's edition, p. 52.

CHAP. I

a law to be applied to the citizens of different states, and therefore a system of international private rather than public law. In time the principles of the *jus gentium* came to be associated and even identified with the *jus naturale,* which, like the universal law of the Greeks, was a law based upon the rational nature of man. It was argued that the principles of justice found to be acknowledged by all states must presumably have their foundation in nature itself, although the latter remained the absolute standard by which such principles were to be judged.

The association of *jus gentium* with *jus naturale* led in turn to the enlargement of the *jus gentium* by the addition of rules governing the relationships between states themselves.[1] Disputes between states within the empire were referred to Rome, and in so far as they involved questions of personal or property rights analogous to the rights of individuals it was but natural to apply to their solution the rules of the *jus gentium.* The law of *alluvium,* the right to occupy land that was *res nullius,* absolute title to property, contract rights, and other parts of the private law were thus adjusted to form a code of international law. This method of arguing from the rights of individuals to the rights of states and of regarding natural reason, as expressed in custom, as a source of law, was regularly resorted to during the Middle Ages in the struggle to bring law and order out of the prevailing anarchy, and it provided a powerful instrument in the hands of Grotius and his followers in their efforts to reconstruct international society of the seventeenth century upon a more stable basis.

Jus fetiale and *jus bellicum*

Subordinate to, but apparently distinct from, the Roman *jus gentium* was the *jus fetiale* and the *jus bellicum.* The *jus fetiale* was a special set of principles and rules regulating the formalities attendant upon a declaration of war as well as those involved in the conclusion of treaties of peace and in the process of extradition. They were of great antiquity and had their origin rather in the religious traditions than in the legal conscience of the Romans. A violation of them was thus primarily an offense against religion. The College of Fetials, to whose keeping they were intrusted, performed both diplomatic and judicial functions. As ambassadors or heralds they formulated the demands of their state, asked for due redress, negotiated the extradition of fugitive criminals, and took part in the conclusion of alliances. As judges they determined whether the proposed war was just or unjust according to

[1] The precise process of development is not clear. See Phillipson, I, 92, 93.

the four grounds of war prescribed by the *jus fetiale*.[1] Comparing the narrow restrictions of the four grounds of war, embracing only attacks upon Roman territory and the violation of treaties and of the immunities of ambassadors, with the numerous wars waged by the Romans, many writers have been led to regard the fetial procedure as a mere cover for arbitrary conduct.

The *jus belli* or *jus bellicum*, while sometimes included under the *jus fetiale*, was distinct from it in that it related to the rights and obligations involved in the actual conduct of war. Its rules were derived partly from religion and partly from the universal law of nature. Acts of treachery were condemned,[2] poisoned weapons were forbidden, and assassination was reprobated.[3] But on the whole it must be said that the war practices of the Romans, while, like those of the Greeks, less ruthless than the practices of their "barbarian" neighbors, were frequently in open contradiction to the principles recognized by statesmen; and such restraint as was observed must rather be put down to the nobility of character of the particular commander than to the traditions imposed by the state upon its military officials. The rule of good faith alone appears to have been consistently observed.

The period of the decline and fall of the Roman Empire was marked by a general loosening of the bonds which held the former dependencies of Rome together. The constitutional law imposed by Rome lost its vitality when the central source of its authority became corrupted from within. Invading hordes which had never been part of the recognized constitutional system broke through the defenses of the colonial outposts and occupied the lawgiving seat of the empire. There was now no bond of a common dependence upon Rome and no sense of a community of interest among the colonies themselves. Each defended itself against the invader as best it could, and within each colony internal strife destroyed what sense there was of a corporate unity. Justinian attempted to revive the authority of law by his codification of the legal traditions of Rome, but there was no basis at hand upon which a society of nations could be constructed.

[1] Phillipson, II, Chap. XXVI.

[2] There is the classic instance of the schoolmaster of Falerii. Livy, V, 27, 28. The language of the Roman commander on that occasion is memorable. "There are," he said, "laws of war as well as of peace; and we have learned to enforce them not less justly than bravely." Cited by Walker, *History of the Law of Nations*, I, 48-49.

[3] As in the case of Pyrrhus and of Arminius. Tacitus, II, 88.

CHAP. I

c. The Holy Roman Empire

The year 800 A.D., which saw the coronation of Charlemagne as Emperor of the West by Pope Leo III, opened a new era in the history of international relations. The plan was conceived of reviving the ideal of an ordered world by bringing to the support of the empire the new bond of the Christian faith. Throughout the Dark Ages of the barbarian invasions men looked back to Rome as the symbol of law and order, and it was felt that if peace among the nations was to be established at all it must be upon the basis of a single unifying authority. But Christianity had in the meantime entered its claims to the spiritual allegiance of the Western world, and its official head, the pope, was able to promise the new emperor effective aid in accomplishing a task at which others before him had failed. The whole organized influence of the church, cutting across national lines, was to help establish the reign of law upon which the salvation of society depended. The emperor was to wield the temporal sword which would reduce rebellious individuals to obedience to the actual precepts of the law. The pope was to hold the spiritual sword which would enforce the observance of those common principles of morality which lay behind the law. Thus was formed the Holy Roman Empire, within which peace through law was to be maintained by the coöperation of the temporal and spiritual authorities.

Effects of the feudal system

In this reorganization of the old empire on a new basis there was even less room for the existence of an international law in the modern form than there was during the reign of Augustus. For the Roman system of colonial administration was replaced by the feudal system, which practically eliminated the corporate personality of the individual state by identifying political authority with land tenure. The internal organization of the state was fundamentally altered by reducing the individual to a position of immediate dependence upon his overlord, to whom he owed personal allegiance, whereas before he had been bound by the more comprehensive and abstract law of the state. The state thus ceased to be based upon a community of interest between citizens and became a successive series of personal relations to the feudal lord. Territorial sovereignty accompanied the feudal tie. The result was that the centralization of the authority of the empire in the hands of the emperor amounted to no more than an acknowledgment of personal homage. There was no community of feeling between the separate feudal states, as there was none between the vassals of different lords. A common law of nations was as impos-

sible as a common law of the state.[1] If the emperors, by reason of their exalted position, from time to time acted as arbitrators between kings and princes, in so doing they were exercising their personal influence rather than performing recognized legal functions attendant upon the prerogative of their office.

Influence of the church

But what the empire lacked in cohesiveness the Church of Rome undertook to supply. Both directly and indirectly it sought to lay a restraining hand upon the centrifugal forces which manifested themselves within the first century after the founding of the empire. On the one hand the pope, as spiritual head of Christendom, undertook to pass judgment upon the conduct of princes no less than upon that of individuals. Since sovereignty was a personal relationship between vassal and lord, it was possible in cases of misconduct to threaten rulers with deposition, and even to depose them by releasing vassals from their oath of allegiance, the binding force of which was moral rather than political. The same spiritual authority enabled the pope to offer his good offices and mediation and to act as arbitrator in disputes between princes. This latter function was one of the highest importance, and the record of arbitral cases decided either by the popes themselves or under their influence is one of the brighter pages of an era given over for the most part to petty wars.[2]

In addition to the functions of arbitrator, the church undertook to lay a general restraint upon the practice of private warfare between feudal princes. During the tenth century conventions of the clergy proclaimed the Truce of God, which forbade resort to arms on certain days of the week and during certain seasons of the year.[3] At the same time the effort was made to prevent the resort to arms through the organization of peace leagues or associations which were established in the various dioceses. While these movements partook more of the character of intrastate regulations than of international law, in feudal times the line between individual conduct and the corporate conduct of the state was scarcely distinguishable. Moreover, specific prohibitions were issued by the church from time to time against particular practices of warfare which appeared barbarous. Its early opposition to the

[1] The latter did, however, develop later in countries such as England where the feudal system soon lost its hold.

[2] Nys, *Les Origines,* Chap. V; Moore, *International Arbitrations,* V, Appendix III, translating from Mérignhac, *Traité Théorique et Pratique de l'Arbitrage International.*

[3] Walker, *History,* I, 85-86.

CHAP. I

profession of arms later developed into an attitude of official sanction, when the clergy came to exact a vow from the warriors of feudal times that they should use their weapons for the protection of the weak and the defenseless and of the church. This religious vow, on which the whole institution of chivalry rested, did much to ennoble the conception of private warfare and helped to mitigate the cruelty of earlier times. It seems, however, to have failed when large armies were in the field and when the hosts of the crusaders went into battle against the heathen.[1]

Conflict between church and state

But the beneficent influence which the church sought to exercise by these methods was offset by the conflicts of jurisdiction between pope and emperor. Theoretically, the functions of the two were distinct; practically, they overlapped at many points. The conflict over investitures which culminated in the triumph of Gregory VII over Henry IV was but one of many disputes between the temporal and spiritual powers. The plan of coöperation on equal terms in the maintenance of unity and law gave way to a rivalry as to which should take precedence over the other. By the time of Boniface VIII (1294-1303) the pope had succeeded in asserting the priority of the claims of the church, but the long struggle cost the papacy the loyalty of the feudal princes, and the spiritual sword of the Holy Roman Empire was as little able as the temporal to maintain its authority over the growing tendency of the units of the empire to assert their independence of control. The ideal of a world state, which men still believed to be the true, even if unattainable, principle of law and order, was defeated partly by the inability of pope and emperor to adjust their respective claims and partly by the inherent looseness of the feudal bond.

Influence of civil and canon law

In the meantime the progress of secular and religious learning was helping to lay the wider foundations of law which became in later centuries the basis upon which the modern system of international law was built. The study of Roman law was revived in the universities, and the Corpus Juris Civilis was found to contain many principles of law for the regulation of conduct between individuals which, being deduced from general principles of justice, were equally applicable to the relations between states. In the meantime the study of the canon law of the church was being pushed forward with equal vigor. The treatise published by Gratian at Bologna in 1148 (?1144), known as the Decretum, and

[1] Walker, *op. cit.*, I, 129 ff.

supplemented by the Decretals of Gregory IX and similar decretals of later popes, came to be known under the general term of Corpus Juris Canonici, official sanction being given to it by Gregory XIII in 1580. Many questions of international law, especially those relating to war, were discussed by the canonists from the point of view of general morality and Christian traditions. The canon law held valid throughout all Christendom, and, while it was administered in separate courts, it kept before the minds of men the ideal of a general rule of conduct transcending the local laws of the separate communities.[1]

Growth of commerce

With the growth of medieval commerce a new element entered into the law of nations. After the barbarian inroads of the sixth and seventh centuries trade began to revive among the maritime cities of the Mediterranean and along the shores of the Baltic. Collections of maritime customs were drawn up setting forth the rights and duties of merchants and ship-owners of different countries in their dealings one with another. The Rhodian Laws, of uncertain origin, possibly dating back as far as the seventh century, the Tabula Amalfitana of the eleventh century, the Laws of Oleron of the twelfth century, the Laws of Wisby, dating from the thirteenth or fourteenth century, and in particular the Consolato del Mare of the fourteenth century, while dealing with the relations between individuals of different countries and thus belonging to international private law rather than public law, had considerable influence in strengthening the conception of a general law taking precedence within its field over the law of the particular state. Moreover, confederations of independent communities arose, such as the Hanseatic League (1250-1450), for the protection of commerce and offered in their limited way an example of the possibilities of the order and prosperity that might flow from the adoption of a common rule of law.

Formation of national states

By the close of the Middle Ages the character of the European state system had completely changed. The Holy Roman Empire had lost its vitality as a bond of union between Christian princes. Independent national states were being formed which disavowed the recognition of any higher political authority than the will of their individual rulers. Territorial sovereignty was replacing feudalism in the internal organization of the state. England,

[1] A valuable survey of the doctrines of the theologians and canonists of the Middle Ages may be found in Vanderpol, *La Doctrine Scholastique du Droit de Guerre*, Part II.

CHAP. I

France, and Spain had by the year 1500 become unified in the hands of powerful monarchs whose control extended throughout the length and breadth of their kingdoms. The Italian cities had won their independence. The petty German states alone still paid formal deference to the emperor, but even in them the spirit of local sovereignty was beginning to assert itself. Europe was no longer a community of states owing allegiance to a single political superior. The conception of unity set forth in Dante's *De Monarchia* had been succeeded by the practical political cynicism of Machiavelli's *Prince,* which gave expression to a state policy of enlightened self-interest and glorified deceit. Parallel with this development of self-conscious nationalism came the repudiation of the spiritual authority of the church, both in its external activities as an organized institution and in its assertion of the principle of Christian unity under a common head. The Reformation merely gave further expression to a sense of independent self-determination which the new learning of the Renaissance had awakened. World empire had failed because the political unity which it sought to attain had neither economic nor compelling social interests behind it, and because the ambitions of rulers and the rivalries attendant upon dynastic succession prevailed over the unorganized demand of the people at large for peace.

The Thirty Years' War

The old order in Europe was dead; the new order had not yet come to life. For a century or more Europe drifted in a state of helpless anarchy; each nation's hand was against its neighbor, and no state was certain of its rights or its obligations. The Thirty Years' War, beginning in 1618, was a confused struggle in which religious and political objects were inextricably bound up. The secularization of church lands in Germany, the extension of religious toleration, the maintenance of the authority of the emperor over the German princes, were the original questions at issue. But, beginning as a domestic struggle within the German states, the war drew into its vortex one state after another which had originally no part in the dispute, and whose interference was prompted by apprehension lest the victorious emperor should threaten their security by becoming again the dominant political power in Europe. It exhausted the resources of the participants and made of much of Germany a barren waste. Finally it was terminated by the Peace of Westphalia of 1648, consisting of the two treaties of Osnabrück and Münster, to which all of the leading Christian

states of Europe were parties, although England and Poland were not represented in the negotiations.[1]

d. The Peace of Westphalia and the sovereignty of states

The negotiations at Osnabrück and Münster mark the first of the great European conferences which may be regarded as potential or embryonic lawmaking bodies. Implicitly, if not by its definite provisions, the Peace of Westphalia created what was in effect a new society of nations and gave to that society a fundamental law. Two new states, Holland and the Swiss Confederation, were formally recognized as independent. France, Spain, Portugal, and the Italian cities and duchies had been so long emancipated from the empire that it was not thought necessary to give even formal confirmation of their status. The individual German states, some three hundred and fifty in number, continued under a confederation with the emperor at its head; but with one restriction they were empowered to contract treaties with one another and with foreign powers, so that they became practically sovereign in their foreign relations as well as absolute rulers within their own domains. The emperor and the Imperial Diet remained, but so far shorn of power as to influence but little the politics of Europe.

The balance of power

Henceforth the international community was to consist of coequal members individually independent of any higher authority. The principle of territorial sovereignty was definitely established in both political and religious matters. Individual sovereigns were supreme in the exercise of political control over their subjects and supreme in the exercise of spiritual control except in so far as religious toleration had been guaranteed to the three principal confessions.[2] A balance of power both within the empire and between the empire and its neighbors had been set up by which the dominance of any single state might be prevented in the future. Finally, a legal sanction was given to the settlement by the provision of both treaties to the effect that "all and each of the contracting parties of this treaty shall be held to defend and maintain all and each of the dispositions of this peace, against whomsoever it may be, without distinction of religion."[3] The Peace of West-

[1] Russia had not yet been recognized as a European power. Turkey was also outside the pale.

[2] Namely, Catholic, Lutheran, and Calvinist. Hill calls attention to the "essentially political character of the religious settlement." *History of European Diplomacy*, II, 602.

[3] *Ibid.*, 602, n. 1.

CHAP. I

phalia thus marked the beginning of a new era in international relations—a statutory landmark in the public law of Europe.

From the Peace of Westphalia to the close of the World War the fundamental character of the society of nations remained substantially unchanged. The principles of territorial sovereignty and legal equality continued to be the foundations of its code of law. In the outward form of the society of nations, however, and in its internal organization, there were important changes, as also in the scope of the law and in the conception of the nature of the law and of its binding character. To present a detailed account of these changes would be to write a history of the entire period, for henceforth international law, though often respected more in the breach than in the observance, was an integral part of the life of Europe and of the world. It is possible, however, to survey the main lines of development, first in the political life of the international community and then in the nature and sanction of the law.

Period between 1648 and 1713

The badly adjusted balance of power set up by the Peace of Westphalia soon proved unstable. The sovereignty of states meant in that age of absolutism the sovereignty of individual rulers, whose natural ambitions and legal irresponsibility found ready excuses for aggression upon neighboring states. In the absence of an organization competent to give effect to the common will as expressed in the treaty, security for the individual states could be obtained only by the formation of alliances to offset any attempt to overthrow the existing political equilibrium. Mutual protection was seen to depend upon the intervention of third states in affairs not directly their concern, whenever there appeared to be danger that any single power might acquire a dominating position. This principle of a balance of power was as old as history, and it had already been strikingly applied during the Thirty Years' War when Catholic France, fearing the menace of a victorious emperor, intervened in the struggle on the side of the Protestant party. During the second half of the seventeenth century the dynastic claims of Louis XIV led to a series of wars in which one power after another intervened to prevent the undue extension of French control. The Peace of Utrecht in 1713, which ended the War of the Spanish Succession, had definitely in view the principle of the balance of power and gave what were thought to be new sanctions to it. Provision was made that the crowns of France and Spain should never be under the same head, although of the same dynastic

family, while Austria received compensations in Italy and the Belgian Netherlands.

Period from 1713 to the French Revolution

The equilibrium set up by the Treaty of Utrecht was maintained until the ambition of Frederick the Great to extend the territory of Prussia led to his invasion of Silesia in 1740. France reasserted her claim to Belgium. Again there came the intervention of third parties, and the Treaty of Aix-la-Chapelle in 1748, by requiring the mutual abandonment of conquests, except that of Silesia, reaffirmed the principle of the balance of power. A second treaty, that of Hubertsburg in 1763, closed a further period of aggression on the part of Frederick against Austria. The public law of Europe, within a century of its reaffirmation at Westphalia, had reached its lowest ebb. Dynastic rivalries continued to fill the forefront of the stage. Treaties were binding only so long as there were forces at hand to maintain them. The flagrant violation of the Pragmatic Sanction, by which the emperor had endeavored to secure the peaceful succession of his daughter Maria Theresa, showed how little the nations were ready to keep faith one with another.

Colonial rivalries

Outside of Europe, colonial rivalries were the chief preoccupation of the great maritime states. The conquest of the New World had raised many legal questions as to the basis upon which title to territory rested. Important additions were made to the body of international law by applications of the principles of the Roman law respecting private property to the occupation and settlement of territory in America. For the most part, however, legal title was regarded as of small consequence, and victors on the battlefields of Europe dictated, as at the Peace of Paris of 1763, the fate of colonies across the seas. As yet the colonies themselves had won no direct or individual recognition in international law, but new problems had arisen in connection with the monopoly of colonial trade reserved to the mother-country. The proclamation by Great Britain of the famous Rule of 1756, which denied the right of neutral states to engage in trade between a belligerent's colonies and the home ports when such trade was closed to them in time of peace, took its place beside the earlier French Marine Ordinance of 1681 as an attempt on the part of a powerful state to dictate the law of the sea to its weaker neighbors.

Changes in the membership of the family of nations

The course of the eighteenth century was marked by important changes in the membership of the family of nations. By the Treaty of Nystad of 1721, which marked the transfer to Russia of

CHAP. I

the Baltic provinces of Sweden, Russia formally entered the family of nations, and by reason of the strength of her army and the domestic reforms of Peter the Great she was promptly recognized as a leading power. In 1701 the elector of Brandenburg obtained the title of king, and by 1763, in consequence of the victories of Frederick the Great over Austria and her allies, Prussia attained to the rank of a leading power. In 1772 the first of the partitions of Poland took place, Russia, Prussia, and Austria each taking its share. A second partition followed in 1793 and a third in 1796, the latter terminating Poland's international existence. These partitions were an open and gross violation of the basic principles of international law. Inasmuch, however, as three of the leading powers participated in them, there was no corresponding group to be found sufficiently strong to make effective protest or willing to undertake the defense of the victim. In the meantime the Treaty of Versailles of 1783 marked the recognition of the independent statehood of the new American republic, which in entering the family of nations was destined to make important contributions of its own to the development of international law.

Period from 1789 to 1815

With the outbreak of the French Revolution the problem of the balance of power again preoccupied the attention of Europe. The attitude of the leaders of the Revolution was at first strikingly progressive. The National Assembly declared in 1790 that the French nation renounced wars of conquest and would never use force against the liberty of any people. This was followed in November, 1792, by an announcement from the National Convention that France was ready to come to the aid of all peoples who might wish to recover their liberty, and by a more drastic decree in December to the effect that the French nation would treat as enemies every people who, refusing liberty and equality or renouncing them, might wish to retain, recall, or treat with a prince or the privileged classes. The decrees of 1792 thus paralleled in their method, though not in their objects, the dynastic interventions of the absolute monarchs. The Abbé Grégoire was intrusted with the drafting of a Declaration of the Rights of Nations as an appendix to the Declaration of the Rights of Man. The draft proposed by him contained a number of sound, if idealistic, principles, but it was rejected by the Convention in 1795 when the republic was about to enter upon new wars. The radical doctrines of the Revolution and the imprisonment of the king brought about the intervention of outside powers. The emperor of Austria declared in 1791 that

it was necessary "to save all Europe from revolt and anarchy," and in 1792 the duke of Brunswick, at the head of the allied armies of Austria and Prussia, invaded France. His defeat at Valmy gave encouragement to the belief that the propaganda of revolution by force of arms might be successfully carried out, as expressed in the December decree. Equally unsuccessful was the intervention of the larger coalition in 1794-95. But the powers were still unwilling to give recognition to a state which in its government defied the political traditions of the rest of Europe.

The Napoleonic era

From having been on the defensive, the new republic now became conscious of its strength, and with Napoleon at the head of its armies the war was carried into the enemy's territory. Dynasties were overthrown, new states created, alliances contracted, and the boundaries of France extended. The balance of power was completely unsettled, and international law seemed in danger of becoming once more the will of a supreme monarch. But the power of a single state, supported by artificial alliances, was unable to hold out against the successive coalitions formed to check its menacing control. Napoleon fell in 1814, though not before Europe had been shaken to its foundations. Old conceptions of absolute monarchy had been questioned and new ideals of democracy spread abroad. The feudal system with its patrimonial conception of sovereignty had disappeared. A new code of law had been published which guaranteed the social equalities won by the Revolution. The old territorial landmarks had been shifted, and nationalism as a bond of statehood had gained both in Germany and Italy a hold upon the imagination of the people. The opportunity of reorganizing Europe upon a more stable basis was at hand if statesmen could be found to undertake the task.

Assertion of neutral rights

The development of the law of neutrality had been a significant feature of the long naval war between Great Britain and France. In 1793 the United States, in spite of the French plea for support based upon the treaty of 1778, declared its neutrality, and a year later it adopted a Neutrality Act which was to become a standard for future times. The League of Armed Neutrality, which had been formed in 1780 to resist the pretensions of Great Britain concerning the capture of contraband and the blockade of enemy ports, was revived in 1800 by four of its members, Russia, Prussia, Sweden, and Denmark, as the Second League of Armed Neutrality. The United States, without joining the league, gave support to it by a vigorous resistance to the extravagant claims of the bellig-

CHAP. I

erents and was brought to the verge of war with France in 1798; and after long and futile efforts to maintain its rights as a neutral against the action of both Great Britain and France it finally declared war against the former in 1812. The War of 1812 was, however, distinct from the general conflict in Europe, so that the United States concluded peace with Great Britain in 1814 without being led to participate in the congress that had assembled at Vienna to reorganize Europe after the fall of Napoleon.

e. The Congress of Vienna and its aftermath

The Congress of Vienna, like the Congresses of Osnabrück and Münster, assumed what was practically the rôle of a great law-making body. It formed new states by the union of Sweden and Norway and of Holland and Belgium, and it confirmed the action of Napoleon in consolidating the numerous German states and formed them into a loose confederation of thirty-nine members. Its chief object, however, was the restoration of the balance of power in Europe which had been so greatly unsettled. The leading powers had announced in the treaty of May 30, 1814, that it was their desire "to put an end to the long disturbance of Europe and to the suffering of the people by a stable peace based upon a just division of forces between the powers and carrying with it a guarantee of its permanence." But the purpose thus announced was completely frustrated by the reactionary principles which dominated the congress. The decisions taken by it proved to be the occasion of new wars throughout the nineteenth century to undo the plans so carefully made. Domestic revolution followed in the wake of the restoration of the deposed monarchs, and wars of liberation followed the suppression of aspirations for national union. The progressive work of the congress was insignificant by comparison. It consisted in the internationalization of the Rhine and the Scheldt, the reorganization and neutralization of Switzerland, and a general prohibition of the slave trade.[1] Long-standing disputes of diplomatic precedence were settled by a definite classification of diplomatic agents.[2]

Period from 1815 to 1856: The Holy Alliance

Important changes in both the organization and membership of the family of nations marked the decade succeeding the Congress of Vienna. While the Treaty of Vienna was being drawn up three of the leading powers—Russia, Prussia, and Austria—formed the Holy Alliance, whose object, as announced, was to apply the principles of Christian morality in the administration of their domestic affairs as well as in the conduct of their international relations.

[1] See below, pp. 263, 87, 207. [2] See below, p. 355.

The alliance was subsequently joined by most of the European states, with the exception of Great Britain, which refused to join in a personal alliance of sovereigns. In contrast with this idealistic alliance there was renewed in the same year the Quadruple Alliance which had been formed in 1814 to resist Napoleon. Russia, Prussia, Austria, and Great Britain pledged themselves "to hold periodical meetings for the consideration of important common interests, and to concert measures for the peace and welfare of the peoples." Thus was formed an inner circle or directorate of states which, without openly repudiating the principle of the equality of the members of the international community, assumed quasi-legislative powers and undertook the direction of the affairs of Europe as a whole.

The Quadruple Alliance, or Tetrarchy, of 1815 became by the accession of France the Quintuple Alliance, or Pentarchy, of 1818. At the Congress of Aix-la-Chapelle in 1818 a declaration was signed in which the assembled powers recognized the law of nations as the basis of international relations and pledged themselves to act in the future according to its rules. But at the Congress of Troppau in 1820 the alliance, reduced by the defection of Great Britain and France to three members, was led to announce the fatal principle of armed intervention. The famous Troppau Protocol declared that "states which have undergone a change of government due to revolution, the results of which threaten other states, ipso facto cease to be members of the European [Holy] Alliance, and remain excluded from it until their situation gives guarantees for legal order and stability"; and the three allies bound themselves, if immediate danger threatened other states in consequence of such changes, to resort if necessary to arms to bring back the guilty state into the bosom of the Great Alliance. This was an attack upon the fundamental principles of the independence and equality of states, and it reduced the established traditions of international law to the arbitrary will of a small group of absolute monarchs. In the popular mind the Holy Alliance became associated with the declaration of the three powers at Troppau and their subsequent measures to give effect to it, and the alliance has accordingly had to bear the reproach of liberals ever since. Speaking strictly, the Holy Alliance, which embraced most of the European rulers, was not so much a treaty as a declaration of faith, binding its members to no specific action.

The effects of the Protocol of Troppau upon the development

CHAP. I

The Monroe Doctrine

of international law were far-reaching. Intervention in Naples and Spain passed without protest. But when the alliance proceeded to offer support to Spain in a war to reconquer her colonies in America which had declared their independence, the United States saw that its own interests were deeply involved. President Monroe was thus led to deliver, on December 2, 1823, the message in which the American continent was marked off as a field within which distinct principles of international law were henceforth to apply. The Monroe Doctrine first declared that the American continents were no longer open to colonization by European powers. It then announced that the United States would consider any attempt on the part of the Allied Powers "to extend their system" to the Western hemisphere as dangerous to its peace and safety. While disclaiming any intention on the part of the United States to interfere with the existing colonies or dependencies of Europe, the message announced that in respect to the new governments which had declared and maintained their independence, and whose independence had been duly recognized by the United States, any interposition for the purpose of oppressing them or controlling in any way their destiny would be regarded as the "manifestation of an unfriendly disposition towards the United States." The new application thus given to the principle of non-intervention and the assumption by the United States of a form of guardianship over the states of the Western hemisphere created problems which are still among the unsettled parts of international law.

Balance of power in the Near East

The development of international law during the second half of the nineteenth century proceeded so rapidly and spread out so widely that all but the most significant features must be reserved for treatment under the separate headings of the law. In respect to the organization of the society of nations, the balance of power remained the point of central interest. In 1853 the disturbance of the political equilibrium caused by the attack of Russia upon Turkey brought Great Britain, France, and Sardinia to the rescue of the failing Ottoman Empire. By the Peace of Paris of 1856 Turkey was formally admitted to full membership in the society of nations, and was protected, as it proved, for another generation in her European possessions. The emancipation of the Balkan states had to await such time as it could be accomplished without enhancing the prestige of Russia. Again in 1877 Russia unsettled the balance of power by the defeat of Turkey and the subsequent Peace of San Stefano; but this time it was possible without war

to check the threatened dominance of Russia in the Near East. The Congress of Berlin, while liberating Serbia and Rumania, left Bulgaria under a nominal sovereignty of the sultan and was satisfied with mere promises of reform in Macedonia. New life was again infused into the Turkish Empire.

Balance of power in central and western Europe

In the meantime the balance of power in central and western Europe was in need of complete readjustment. The unification of Italy had been accomplished by 1870 and there was a new Great Power to be reckoned with. The German Confederation had been broken up in 1866, and a new federation of North German states under the domination of Prussia had been formed. The defeat of France in 1870-71 and the federation of both North and South German states into the empire caused several shiftings of the weights in the scale. In 1879 Germany formed with Austria the Dual Alliance, which by the accession of Italy in 1884 became the formidable Triple Alliance. For a time the weight was heavily on one side. Then France formed with Russia in 1891-95 the Dual Alliance, and the balance was for the time being restored. The definitive partition of Africa was accomplished by the Congress of Berlin in 1885 with but slight reference to the balance of power in Europe.

Growth of new rules of law

While these changes in the organization of the society of nations were in progress the scope of international law was being greatly enlarged. The Declaration of Paris of 1856 added new and more progressive principles to the law of maritime warfare.[1] The internationalization of the great river highways of commerce was extended by the inclusion of the Danube in 1856 and of a number of South American rivers during the same decade. The law of war was amended by the adoption at Geneva in 1864 of a Convention for the Amelioration of the Condition of the Wounded in War, adhered to by the great majority of the states and later known as the Red Cross Convention. A further amendment was introduced by the Declaration of St. Petersburg in 1868, which placed a restriction upon the use of explosive bullets. In 1874 an effort was made at the Brussels Conference to draw up a Code of Warfare on Land, modeled after the code adopted by the United States for its armies in 1863, but the agreement failed of ratification. The suppression of the slave trade in Africa was made the object of a special conference at Brussels in 1890, which resulted in a general agreement between seventeen states. A striking growth in the practice of

[1] See below, p. 493.

CHAP. I

arbitration marked the period following the successful settlement by arbitration of the Alabama Claims at Geneva in 1872.

Administrative unions

Large in bulk, but less significant from the point of view of the interests involved, was the body of law developed by the numerous international conferences which met from time to time for the regulation of a wide variety of economic and social, as distinct from political, questions. Special "unions" were formed for the permanent regulation of the particular interests involved.[1] The agreements reached by these conferences deal with interests, such as postal and telegraphic correspondence, which are so far uniform and common to all the nations that it has been possible to regulate them by a single convention to which all states may be parties. Their importance in the development of international law lies chiefly in the influence they have had in creating an understanding of the possibilities of international coöperation and in preparing the way for an international agreement upon more vital issues.

1. The development of law by collective action: the Hague Conference of 1899

The calling of the First International Peace Conference, which met at the Hague on May 18, 1899, marked an important step forward in the development of a new contractual or statutory form of international law. Called by the czar of Russia with the primary object of promoting a general limitation of armaments, the conference found it impossible to reach an agreement upon its main purpose, but succeeded in formulating an agreement directed toward its ultimate object of securing the general peace. A Convention for the Pacific Settlement of International Disputes was adopted, representing the first general contractual agreement of the nations upon what they believed to embody the "principles of justice and equity." Limited as were the obligations entailed by the convention, it showed the possibilities of a form of statute-making by common consent. The same was true of the two other conventions and three declarations adopted by the conference, all of which related to the law of war.[2] The Hague Conference assumed, as it were, the functions of a quasi-legislative body, codifying existing international law and creating new rules, notwithstanding the fact that the agreements adopted were subject to the subsequent ratification of the several governments.

The conference of 1907

The Second International Peace Conference met at the Hague on June 15, 1907. This time the Latin-American states sent delegations, raising the earlier number of states represented from

[1] See below, pp. 65-66.

[2] See below, pp. 461, 502.

twenty-six to forty-four, which included practically the entire family of nations. As a law-making body, the second conference did not differ essentially from the first conference, but the number and scope of the conventions adopted gave it a greater importance. During the interval between the two conferences the prestige of arbitration as a means of settling disputes had been greatly increased in consequence of the submission to the Hague Court of a number of important cases. But the conference was unable to reach an agreement upon even a limited obligation to arbitrate, although it was unanimous in admitting "the principle of compulsory arbitration." With the object of correcting the defects shown by the experience of the past eight years, amendments were introduced into the Convention for the Pacific Settlement of International Disputes adopted by the conference of 1899. In addition a draft project for the creation of a Judicial Arbitration Court received the approval of the delegates, but remained unsigned owing to the difficulty of deciding upon a method, satisfactory to large and small states alike, for the election of the judges of the court.

A second constructive agreement was reached in the convention restricting the use of force in the collection of contract debts. All of the eleven other conventions and three declarations related to war and neutrality, consisting in a further codification of existing rules and the creation of new ones. In spite, however, of the fact that the great bulk of the work of the conference related to the law of war, the meeting was officially designated as a peace conference and is popularly known by that title. A recommendation was adopted providing for the holding of a third peace conference within a period corresponding to the interval between the first and second conferences.[1]

The Declaration of London

Owing to the failure of the delegates attending the second peace conference to agree upon a code of maritime warfare corresponding to the code of warfare on land, the leading maritime powers assembled in conference at London on December 4, 1908. The result of their deliberations was the formulation of the Declaration of London, signed on February 26, 1909.[2] This important code covered the chief points in dispute between belligerent and neutral

[1] For a study of the work of the Hague peace conferences see Higgins, *Hague Peace Conferences;* Scott, *Hague Peace Conferences of 1899 and 1907.*

[2] For the effect of the failure of the signatory powers to ratify the declaration, see below, p. 64.

CHAP. I

states, and thus provided a body of rules which could be applied by the prize courts of the several states and, it might be, by the International Prize Court established at the second peace conference. The limited membership of the London conference marked a tendency on the part of the Great Powers to legislate for themselves in matters in which they were primarily concerned, leaving it to the smaller states to be governed by the new rules or to appeal more or less successfully to the uncertain customary law.

Effect of the World War

It is too soon to estimate the full effect of the World War upon the development of international law. The violation by Germany, on plea of military necessity, of the treaty of 1839 by which Belgium was permanently neutralized showed that even the fundamental doctrine of the faith of treaties could not stand the pressure of alleged national self-preservation in a war between the guarantors of the treaty. The rigorous measures attending the invasion and occupation of Belgium made a mockery of the agreements reached at the Second Hague Conference. New and more drastic rules of contraband and blockade were put forth by Great Britain, with corresponding protest from neutrals. Belligerent merchant ships were sunk by German submarines without warning. New instruments of combat, such as poisonous gases, were devised, aërial warfare put an end to the rules regulating the bombing of unfortified towns; and intimidation was resorted to as a means of breaking the spirit of the civilian population. The entrance of the United States into the conflict was marked by an announcement that the old law of neutrality was at an end and that henceforth the nations must assume a collective responsibility for the peace of the world. New principles of international law were announced by President Wilson as properly forming the basis upon which a permanent peace might be concluded.[1] In the popular mind the term "international law" as relating to the existing rules and their imperfect sanction was a term that no longer bore any relation to the realities or to the needs of international life.

Covenant of the League of Nations

The Treaty of Versailles, by which the war with Germany was concluded by all of the belligerents except the United States, contains among its specific provisions numerous modifications of international law, in addition to including as its first twenty-six articles the fundamental agreement of the Covenant of the League of Nations. The significance of the Covenant of the League of Nations lies both in the changes which it has effected in the organ-

[1] See below, under appropriate headings, pp. 107, 297.

ization of the community of nations and in the amendments introduced into the substantive as well as the procedural parts of international law. The system of the balance of power was impliedly, if not formally, repudiated in the collective responsibility assumed by all the members of the League for the future peace of the world. While the membership of the Council of the League gave formal sanction to the political domination of the Great Powers, their domination was modified by the admission of four other states to their group. Inchoate legislative powers within their separate fields were conferred upon both the Council and the Assembly of the League. Limited executive functions were assigned to the Council. Provision was made for the creation of a permanent International Court of Justice. Qualified guarantees were given to the members of the League in respect to the enjoyment of their independence and territorial sovereignty. Constructive provisions were laid down for the administration by mandates of backward and undeveloped countries. Finally, an International Labor Bureau was established for the improvement of labor conditions in all countries. In addition to the original signatories of the Treaty of Versailles, states not parties to the treaty were invited to enter the membership of the League, with the result that by November, 1923, the membership included fifty-four states. The failure, however, of the United States to ratify the Treaty of Versailles and with it the Covenant of the League, together with the absence of Germany, Russia, and Mexico from the League's membership, raises the question whether the principles and rules laid down in the Covenant can be said to have become incorporated into the body of general international law as distinguished from the more limited agreements or "particular international law" binding only upon a definite group of powers.

Changes in the structure of the international community

Aside from the Covenant of the League of Nations, the several treaties of peace effected fundamental changes in the structure of the society of nations, and in the relations of its component parts. The boundaries of France were enlarged by the annexation of Alsace-Lorraine, while those of Belgium received a slight increase by the cession of Moresnet, Eupen, and Malmédy. To Denmark was ceded the northern part of Schleswig, and to Italy part of the Austrian Trentino and a strip of the Adriatic coast-line. Rumania was enlarged by the annexation of Bessarabia, Transylvania, and part of the Hungarian plain. A number of new states were created. Albania advanced from a condition of wardship under

CHAP. I

the Great Powers to the status of an independent state. Poland was formed from territory taken from Germany, Austria, and Russia, while Czechoslovakia was formed of Austrian and Hungarian territory. Jugoslavia was formed of the existing states of Serbia and Montenegro and of cessions from Austria and Hungary; while Finland, Esthonia, Latvia, and Lithuania were formed of territory taken from Russia. The Arabian state of Hedjaz was carved out of Turkey. Dantzig was made a free city under the protection of the League of Nations. The German colonies were apportioned among the victors under a system of mandates superintended by the League of Nations. Many constructive provisions were inserted in the several treaties, looking to the protection of minorities, the facility of international transportation, and the protection of international social interests. The later Treaty of Lausanne, entered into by the Allied Powers with Turkey, July 24, 1923, radically altered the position of Turkey in the Near East, and introduced important changes in the status of the Dardanelles and Bosphorus.[1]

The Assembly of the League

The first meeting of the Assembly of the League of Nations took place at Geneva, November 15 to December 24, 1920. Among the legal issues to which it gave rise was the question as to the respective jurisdictions of the Council and of the Assembly. The issue involved, though not explicitly, the fundamental problem of the equality of states in international law. Was the more exclusive Council, or was the entire body of states represented in the Assembly, to determine the future of international relations along the lines laid down in the Covenant of the League? The decision reached was not conclusive, being in the nature of a compromise recognizing the concurrent jurisdiction of both Council and Assembly over certain subjects and leaving other subjects, such as the control over mandates, a controversial issue between the two bodies. The most significant constructive work of the Assembly at this meeting was the adoption of a plan approved by the Council for the establishment of a Permanent Court of International Justice. This plan had been formulated by a committee of jurists appointed by the Council under the terms of the Covenant.[2] A number of new

[1] For a survey of the political effects of the several peace treaties, see Temperley, *History of the Peace Conference of Paris*, Vols. II, IV; Hazen, *Europe Since 1815*, rev. ed., Vol. II, 726 ff.; Bowman, *The New World;* Haskins and Lord, *Some Problems of the Peace Conference;* Gibbons, *Europe Since 1918*.

[2] See below, p. 413.

states were admitted to the League, including Austria, Bulgaria, Luxemburg, Finland, Costa Rica, and Albania.[1]

Succeeding meetings of the Assembly took place in 1921, 1922, and 1923, beginning the first Monday in September. Esthonia, Latvia, and Lithuania were admitted as new members in 1921. Approval was given to the decision of the Council of the League to increase the non-permanent members of the Council from four to six.[2] A number of amendments to the Covenant were passed upon and submitted to the individual states for ratification.[3] The judges of the Permanent Court of International Justice were elected, the Assembly collaborating with the Council in this function.[4] In addition, the Assembly exercised functions of the widest variety, debating public questions relating to international peace, hearing appeals from individual members under the terms of the Covenant, and in particular carrying on by committees the administrative work relating to general social and industrial welfare.[5] At the meeting of 1923, the Irish Free State and Abyssinia were admitted to membership, bringing the number of members up to fifty-four.

[1] For a brief summary of the proceedings of the first meeting of the Assembly, see *Am. Pol. Science Rev., XV* (1921), 94 ff. Full details may be found in *The First Assembly of the League of Nations,* World Peace Foundation, 1921.

[2] See below, p. 138.

[3] See Appendix A, foot-notes.

[4] See below, p. 413.

[5] See below, p. 66. A survey of the administrative work of the League may be found in *Handbook on the League of Nations, 1920-1923.*

CHAPTER II

THE NATURE AND SCOPE OF INTERNATIONAL LAW

a. Definition of international law

International law of the present day may be defined as the body of rules accepted by the general community of nations as defining their rights and the means of procedure by which those rights may be protected or violations of them redressed.[1] This definition is drawn from the facts of international relations as they are found recorded in the recent practice of nations. It does not include a reference to the moral standards by which the rules of international law should be tested. This is not because these moral standards are not of the highest importance to the development of a more perfect international law, but because scientific precision requires that it be made clear at every step what rules of conduct are actually recognized by nations as distinct from abstract theories or ideals of future conduct. The definition expresses, therefore, the positive conception of the law as a body of rules, including both general principles of conduct and concrete regulations, to which the nations can be said to have given their adherence as judged by their public declarations and their daily practice.

Relation of international law to ethics

But if moral standards, as belonging to the science of ethics rather than that of law, must be kept distinct from rules actually observed, it must not be inferred that the rules of international law, when definitely ascertained, are not to be tested as to their conformity with the generally accepted principles of justice. International law is confessedly a defective system of securing justice among the nations when compared with the legal systems in force within the more civilized states. It can be improved and developed only through a more effective organization of the nations and a more equitable adjustment of their respective claims than has as yet been attained. In determining the form of this better organization and the methods of this adjustment statesmen must necessarily be guided by comparisons between the rules of international law and the principles of justice prevailing within the

[1] Duties, being correlative to rights, are included in the definition. In practice, however, the emphasis is upon rights, *our* rights and *their* duties.

individual states. It is the task, therefore, of *international jurisprudence* to examine the underlying conceptions of international law, to draw analogies with respect to them from the principles of justice which form the jurisprudence of national codes, and to criticize the existing system on the basis of its adequacy to meet the needs of international life. On the other hand, the study of international law as a system of present conduct has for its primary object to discover the concrete facts of international relations. Nevertheless, the intrinsic justice of these facts may profitably be kept in view on the horizon.

Distinction between universal and general international law

By strict definition, international law should embrace only such rules of conduct as are recognized by all the members of the international community. It is, however, very difficult at times to determine how many of the nations have given their express or implied consent to a given rule. In consequence, the term "universal international law" has been used by some authors to indicate rules binding upon all the members of the family of nations without exception;[1] while the term "general international law" has been applied to rules in force between a large number of states, including necessarily the Great Powers. Further, there are rules in force between two states, or between a small group of states, to which the name "particular international law" has been given. These, however, belong rather to the category of special contractual relations than to that of law. Since the line between universal and general international law cannot always be drawn with accuracy, and since the rules of general international law are often the beginning of a subsequent universal law, it is as necessary to discuss the one as the other; but when no reference is made to a restriction in the number of powers that have accepted a given rule the term "international law" will here be used to mean the law universally accepted.

International comity

In addition to the rules which nations regard as legally binding upon themselves, there are others which it has become a matter of courtesy and mutual convenience to observe. This body of rules has been given the name of "international comity," and it plays a part in international relations similar to that played within the local community by the conventions of social life. Owing to the method by which international law has been formed, from the growth of usage into fixed custom, a rule of international comity has frequently been the first step toward a later rule of interna-

[1] Oppenheim, *International Law*, I, § 1.

CHAP. II

tional law. Examples of rules included in international comity are the recognition of the legislative, executive, and judicial acts of one country by the government of another,[1] the execution of the revenue and sanitary laws of a state beyond the strict limits of the maritime belt, and the occasional extradition of fugitive criminals in the absence of treaty provisions.[2]

International administrative law

A distinct branch of international law which needs to be distinguished from the general body of the law is the series of administrative regulations proceeding from the action of international administrative commissions. It has been found convenient by the nations on many occasions to establish such commissions to administer the provisions of international agreements, such as the convention establishing the Universal Postal Union, or the Union for the Suppression of the White Slave Trade. These commissions issue regulations which have the force of law with respect to the persons and property affected by them. While the authority of the regulations issued is limited by the terms of the convention creating the commission, it operates within that field upon state administrative officers as well as upon individual citizens. The regulations bear an analogy to those issued by municipal boards of health, railway commissions, and similar administrative bodies.

International private law

Much confusion has arisen from the failure to distinguish the rules governing the relations of states as such from the body of law which is applied by national courts in deciding cases involving a conflict of two different systems of law. Suits brought in one country by one individual against another on the basis of rights acquired under the law of another country are decided by principles which have now acquired the character of a distinct and unique legal system, which has been given the name of the "conflict of laws." This name, however, is used side by side with the more ambiguous term, "private international law." A third term, "international private law," commends itself to some writers. It must be observed that the rules of international private law deal with individuals and not with states, that they affect private and not public rights, and that they are applied by national and not by

[1] See Hilton *v.* Guyot, 159 U. S. 113 (1894), where a somewhat restricted definition of "comity" is given by a national court. The term appears in its usual sense in the *Paquete Habana*, 175 U. S. 677, 693, 694 (1899). Scott, *Cases*, 17.

[2] In the recent case of Cunard Steamship Co. *v.* Mellon, 262 U. S. 100 (1923), a dissenting opinion refers to the exemption of foreign merchant vessels in port from interference by the local government in their internal affairs as a matter of international comity.

international courts.[1] Each state is free to apply such rules as commend themselves to it, but by international comity a fairly uniform body of international private law has now been developed.

Foreign policy

A further distinction must be made between the rules of international law and the principles by which individual nations are guided in the determination of their foreign policies. Many of the most important relationships of states are not governed by any rule of law, while many other relations are of such a temporary or non-essential character as to make it undesirable to bring them under a rule of law, even if it were possible to do so. In consequence, within these fields nations are legally free to pursue their interests according to their individual conceptions of their own advantage. The "foreign policy" of a nation may, therefore, be defined as the peculiar or individual attitude adopted by the nation in its relations with other nations, or the special objectives held in view by a government in its diplomatic intercourse with foreign states.[2] The term "diplomacy" denotes the art or science of conducting negotiations with foreign powers. It deals, in large part, with the phases of international relations which lie outside the scope of the law; and since its activities frequently involve the most vital issues of national welfare, diplomacy has become associated in the public mind with keen and at times unscrupulous bargaining.[3] Its business, however, is also concerned with the proper defense of national interests under the law, and in so acting its function is as appropriate to international relations as the function of the attorney who presses the case of his client before a domestic court.

b. Basis of international law

International law, like other forms of human law, is based ultimately upon the realization by states of the need of a rule governing their mutual contacts and relationships. The necessity of a peaceful adjustment of conflicting claims, the consciousness of a body of common interests transcending the interests of individual states, has created a sense of unity and common purpose which is the foundation of all legal institutions. The existence of an international law implies, therefore, that nations have reached

[1] Minor, *Conflict of Laws*, § 2.

[2] For a survey of the foreign policy of the United States see Moore, *Principles of American Diplomacy;* Foster, *A Century of American Diplomacy.* A brief analysis may be found in *Cyclopedia of American Government,* sub tit. "Foreign Policy of the United States."

[3] Under modern conditions diplomatic agents act at almost every turn under instructions from their home governments upon which the blame for dishonest conduct must largely fall. See below, Chap. XXI.

CHAP. II

a stage of development in which they recognize their corporate character as a society or a community, and in that capacity undertake to say that a certain rule of conduct, conducive to peace and order in their midst, shall thereafter be observed. In the earlier stages of the development of international law the recognition by the nations of their corporate unity was implicit in the facts of their actual relations; but in more recent times it has been expressly affirmed in formal international documents.[1] In like manner, the undertaking mutually to observe a rule of law was in earlier times to be inferred from the conduct of the nations and the diplomatic exchanges of their foreign offices; but it has now been explicitly declared. The rules of international law thus rest upon the common consent of the states forming the community of nations; they are rules accepted by the members of the community as binding upon themselves individually and obeyed because of such acceptance. The distinguishing characteristic of the rules of international law is that as a legal system they emanate from the voluntary contractual agreement of a body of states recognizing no common superior, and so loosely organized in the beginning as to be scarcely conscious of the authority attaching to their collective undertaking.

Method of its enactment

While international law bears close resemblance to the municipal law of the individual state in respect to the foundations upon which it rests, it differs markedly from municipal law in the method of its enactment and in the method of its interpretation and enforcement. Owing to the fact that the consciousness of unity among the nations has never been so strong as to lead them to set up an agency having the power of command over the members of the organization and able to enact rules similar to the statutory legislation of national parliaments, by far the larger part of international law has had its origin in common usages which have developed from the more limited practices of a group of nations or from the uniform application of general principles to concrete cases.[2] This growth of international customary law bears a close analogy to the formation of the common law of Great Britain and the United States. But whereas the common law,

[1] See the preamble to the Convention for the Pacific Settlement of International Disputes, adopted at the Hague Peace Conferences of 1899 and 1907, in which the signatory powers refer to themselves as:

"Recognizing the solidarity uniting the members of the society of civilized nations;

"Desirous of extending the empire of law and of strengthening the appreciation of international justice." *Hague Conventions*, 41.

[2] See below, p. 61.

although originating in local customs of immemorial tradition, was ultimately adopted by the king's courts, and thus gained the indirect recognition of the authority of the state, the customs of international law have, with few exceptions, yet to receive this qualified degree of legal definition. The conventions adopted within recent years at international conferences are in substance legislative enactments, analogous to the statutes of municipal law. In legal structure, however, they are contracts voluntarily entered into by a number of separate states rather than the binding statutes of a sovereign legislative body.[1] Neither in the form of custom nor in that of convention is international law the decree of a supranational legislature imposing its will upon a group of states, coerced or pledged to acquiesce in its decisions. Custom and convention acquire their binding force solely from their express or implied acceptance by the nations as having binding force.

Method of its interpretation

In the method of its interpretation international law lacks the authoritative definition which characterizes the application of municipal law to the facts of a given dispute. There are no judicial tribunals intrusted with the duty of enunciating specific rules or of applying the general principles of the law to a concrete case. When questions arise as to the law applicable to disputed claims, direct negotiations are begun between the foreign offices of the contending parties through the channels of diplomatic representation, and if an agreement is reached, whether by compromise or by concession, the issue is disposed of without the concern of the community of nations as a whole. In the event of the failure of direct negotiations between the parties, temporary arbitrary tribunals have frequently been set up for the decision of particular cases. But the jurisdiction of these tribunals has rested upon no higher authority than the will of the parties to the dispute. Failing reference of a dispute to such voluntary agencies, each party may insist upon the correctness of its own interpretation of the law; and should further negotiations result in a deadlock, the last resort may be a declaration of war on the part of the claimant or the sullen acquiescence of the weaker party in the position taken by the stronger. When the ultimate test is reached, each nation remains the judge in its own case.[2]

In the method of its enforcement, international law lacks the

[1] See below, pp. 64-66.

[2] The extent to which this situation has been modified by the adoption of the Covenant of the League of Nations is discussed below, pp. 47-49.

CHAP. II

Method of its enforcement

agencies created by the individual state for the execution of the decisions of its judicial tribunals. Under municipal law no right, whether of person or of property, is so sacred as to warrant a resort to self-help, save only in cases of resistance to sudden attack. Force is completely ruled out as a means of obtaining redress between citizen and citizen. Under international law the right of self-help, which a state denies to its own citizens, it claims as one of the attributes of its sovereignty. In matters arising out of the normal intercourse of states, where no grave issues are at stake, the public opinion of the nations as a body, based upon their collective realization of the necessity of a rule of law, has proved an adequate sanction both to prevent arbitrary assertions of national claims and to secure the observance of rights generally recognized. When, however, issues arise which involve interests believed by a nation to be vital to its welfare, not only does it assert the right to be the judge in its own case, but in the absence of an international executive agency it must undertake on its own account the defense of the claims it is making. Forcible measures falling short of war may prove sufficient; but failing these, war may be resorted to as the ultimate means of self-help; and, since it is regarded at international law as a legal remedy, the results secured by it are recognized by the body of nations as a final settlement of the case.[1] In the resort to war the possibility of the intervention of third parties is to be reckoned with, and this has operated at times to restrain arbitrary conduct as a matter of expediency, without, however, qualifying the legal right of self-help.[2]

c. Is international law true law? The Austinian view

In view of these divergences of international law from the municipal law of the separate states, scholars have long debated whether the term "law" can justly be applied to international law. During the second half of the nineteenth century a school of positive jurisprudence developed, based upon the teachings of the British jurist, John Austin. In his *Province of Jurisprudence Determined* Austin endeavored to place the study of law upon a more scientific basis by classifying the various rules of conduct to which the term "law" was applied, with the object of distinguish-

[1] It is a matter of controversy between writers as to whether war is a legal sanction of international law. Taking the facts as they stand, irrespective of their moral quality, it would appear that war is undoubtedly a sanction when pacific measures have been tried and have failed. See below, p. 428. For references to the literature of the controversy, see Hershey, *Essentials*, p. 8, note 26.

[2] For the newer sanctions provided for in the Covenant of the League of Nations, see below, p. 48.

ing laws which had a definite origin and a definite obligation attached to them from others indefinite in origin and obligation. Law in its general and most comprehensive acceptation was declared to be a rule of conduct laid down for the guidance of an intelligent being by an intelligent being having power over him. "Laws proper," as distinguished from "laws improper," Austin defined to be commands emanating from a determinate authority, whether single person or aggregate body, to which were annexed eventual evils to be inflicted upon those disregarding the law, thus forming a sanction to secure its observance. The term "positive law" was reserved for commands set by men in the capacity of political superiors to political inferiors. Since international law lacked this characteristic, it was relegated by Austin to the domain of ethics or "positive morality," differing in importance, but not in nature, from the social conventions sanctioned by public opinion.[1]

The school of historical jurisprudence

On the other hand, the school of historical jurisprudence, founded by the German jurist, Savigny, and Sir Henry Maine, argued that the definition of law adopted by Austin, while true to the form of enacted law characteristic of modern times, was not true to the earlier forms of customary law. Historical research showed, they contended, that long before enacted laws took their place upon the statute books communities were ruled by customs and usages which enjoyed the full force of law as rules of conduct. Primitive law, it was said, was custom, and custom is a law in itself: its own legislature and its own sanction.[2] Instances were to be found, as among the German tribes described by Tacitus and among the East Indian village communities, where the only rule of conduct known was the will of the community evidenced in the tribal or village customs of immemorial origin. The true test of law was, they held, the fact of its recognition as a binding rule and of its observance as such; and by this test the rules of international law might justly be called law.[3]

Among the more recent writers of the historical school a divi-

[1] *Op. cit.*, 5, 15, 17, 109, 112, and *passim.* For a brief statement of the position of the school of positive jurisprudence, see W. W. Willoughby, "The Legal Nature of International Law," *Am. Journal,* II (1908), 357.

[2] Walker, *History of the Law of Nations,* I, 9.

[3] As Hall says, "It may fairly be doubted whether a description of law is adequate which fails to admit a body of rules as being substantially legal, when they have received legal shape, and are regarded as having the force of law by the persons whose conduct they are intended to guide." *International Law,* 7th ed., 14-15. See further, J. B. Scott, "The Legal Nature of International Law." *Am. Journal,* I (1907), 831.

CHAP. II

Character of sanction

sion may be observed between those who held that some physical sanction is necessary to the existence of law and those who held that a moral sanction is sufficient. A rule, said Oppenheim, can be said to be a rule of law "if by common consent of the community it shall eventually be enforced by external power."[1] This external power need not necessarily be vested in a central authority, but might take the form of self-help, as in the case of early Anglo-Saxon law. Other writers held that a physical sanction was not an essential element, but rather a mere accident, of law; it was a means to secure observance, but not the only means. The approval or disapproval of certain acts by the community might be, under circumstances, an adequate sanction. Where there was a strong law-abiding sentiment among a people, the threat of physical force and the assignment of determinate penalties to secure the observance of the law might be dispensed with. Provided only that this sanction of public opinion was on the whole effective, the rules which it enforced might, therefore, it was claimed, rightly be called law.[2]

The controversy turned, thus, upon the definition of "law" accepted by the particular writer. On the whole, scholars, with the exception of a small group of British and American writers, tended to favor a recognition of international law as true law. The result of the debate, however, was that an academic problem took precedence over an urgently practical one. On the one hand there were certain advantages in limiting the definition of law so as to distinguish between law enacted, interpreted, and enforced by a determinate political authority, and law embodied in custom, interpreted by the parties to the case, and enforced by the sanction of public opinion or by individual appeal to the sword. On the other hand, it was felt that the adoption of a narrow, and what was believed to be arbitrary, definition of law, so as to deny to the rules of international law a legal character, would have an unfortunate effect upon the respect in which the rules of international law might otherwise be held, and would lead the nations

[1] *International Law*, I, § 3.

[2] Walker, *Science of International Law*, 31-32. The past tense is used in describing these opinions, not because they are not held by living writers, but because the controversy practically came to an end in 1914. Since that time the concern has been more with the practical development of international law. The existence of an international law, even in default of an effective sanction, was asserted, *obiter*, in *The Prometheus*, Sup. Ct. Hong Kong, 1906. Scott, *Cases*, 962.

to set aside their obligations with an even lighter hand.[1] What neither group of writers brought out was the fact that while international law operated effectively, whether as "positive law" or as "positive morality," within a limited field of international relations, there were other fields, embracing the most critical issues between the nations, which remained wholly outside the scope of the law. It was the restricted scope of international law, not its essential character within the field in which it actually operated, that constituted its fundamental weakness.

The scope of international law

An examination of the substantive rules of international law will show that the subjects upon which the law is clear and definite are those in which the interests involved either are relatively unimportant or relate to matters of obvious common convenience. These interests fill a large place in the daily intercourse of the nations, and the rules governing them have been, on the whole, as faithfully observed as have been the municipal laws of each separate state. Under the protection of international law citizens of one state have moved freely to and fro in other states and have felt secure in their persons and in their property; ships of every nation have sailed to foreign ports and have there enjoyed equal privileges with vessels of the foreign state itself. Great rivers have been internationalized, and interoceanic canals have been opened to the commerce of all nations. The seas have been made free to the remotest corners of the globe.[2] Fugitive criminals have, by the process of extradition, been returned from the state to which they fled to the state in which the crime was committed. Administrative agencies have been created for the transmission of messages by post and telegraph to all parts of the world. Copyrights and patents have been protected, and conventions adopted in the interest of international sanitation; agreements have been entered into for the joint suppression by the nations of the traffic in white slaves and commercialized vice when working across national boundary lines; and in many other ways the common interests of

[1] Walker, *History*, 18-19. International law is as yet unfamiliar with the modern sociological conception of law formulated in such volumes as Pound's *Philosophy of Law* and *Interpretations of Legal History*. The conception of law as a means to an end, and the conscious determination of that end and adoption of legislation to attain it, while foreshadowed in the growing body of law-making treaties (see below, pp. 64-66), has not yet entered into the science of international law.

[2] For the meaning of the recent demand for the "freedom of the seas," see below, p. 297.

CHAP. II

the nations have been provided for by coöperative agencies of a highly organized character.[1]

Subjects outside the law

The limited scope of international law manifests itself when we turn from matters of common convenience to the more vital interests of the nations. An important group of subjects, involving the very questions which have been at the root of the wars of modern times, lie wholly outside the sphere in which the existing rules of international law operate. Side by side with the economic interdependence created by the complex web of international commerce and finance there exists a condition of economic competition in which the struggle for control over the raw materials of industry, for the trade of foreign markets, for concessions in undeveloped countries, and for other economic advantages remains unregulated by any rule of conduct.[2] Within this field international relations are as lawless as was industrial competition within the individual state during the period when *laissez faire* was the accepted principle. At the same time the primary political interest of national self-defense is as yet beyond the control of international law. In consequence, certain issues, commonly known as "matters of policy," are still withheld from the operation of any prescribed rule. These issues are difficult of definition, but in general they include whatever relates to the safety of the state, both in respect to security from attack from without and in respect to vital well-being from within. In like manner the forces of national expansion, popularly described as "imperialism," cannot be fitted into a recognized category of international rights.[3]

Law *versus* sovereignty

It is the absence of a law governing the more fundamental interests of the nations that explains the apparent contradiction between the sovereignty of states and the existence of rules of international law. The traditional theory of sovereignty implies the complete freedom of a state from control by any higher power claiming authority to regulate its acts.[4] Whatever rules of con-

[1] A full description of and commentary upon these conventions, as of 1911, may be found in Reinsch, *Public International Unions*. Since 1920 the administrative functions referred to have in part been taken over by the League of Nations. See below, pp. 48-49.

[2] See below, Chap. XIX, b.

[3] See below, pp. 308 ff.

[4] The student may compare the original conception of sovereignty as a characteristic of the internal organization of the state with the later use of the term in international relations. Bodin used the term in 1576 to express "a power supreme over citizens and subjects, itself above the law," *summa in cives ac subditos legibusque soluta potestas*. Grotius used it in the same sense, *De Jure Belli et Pacis* (Eng. trans.), Bk. I, Chap. III, § VI; but the term had

duct are recognized by the state as binding upon it must be self-imposed obligations. Existing usages and customs represent rules impliedly consented to by the older states, or explicitly consented to by new states as a condition of their admission into the international community. Further obligations assumed by international conventions must receive the express ratification of the individual state; and in deliberating upon the assumption of these obligations, each state determines for itself the nature of the engagements that it is willing to enter into and the extent to which it will be bound by them. Sovereignty thus implies not the denial of rules of law already in existence, as has at times been its practical significance,[1] but the rejection of rules imposed by a higher authority against the will of the state.

When tested by the facts of international life it is seen that, on the one hand, sovereignty is compatible with numerous restrictions upon state conduct in matters in which the advantages of an orderly adjustment of claims, by the adoption of a common rule of law, have come to be recognized.[2] Within these fields of international relations interdependence has taken the place of independence, and the right of arbitrary decision has been definitely renounced. On the other hand, states continue to remain free agents in respect to other matters which remain outside the law. No obligation can be imposed upon them, by whatever majority of the international community, against their individual wills.[3] Each remains the guardian of its own interests, and the ultimate

then come to imply an independence of external control as well as supremacy within the state. See *Ibid.*, § XXI. Thereafter the term came into general use as negativing the overlordship of one state by another. See Vattel, *Droit des Gens* (Eng. trans.), Bk. I, §§ 4-12. By the nineteenth century the term was further extended to suggest the independent position of the state with respect to the community of nations as a whole.

[1] As when states have fallen back upon their "sovereignty" to repudiate their obligations. In such cases "sovereignty" more often refers to the right of a state to interpret its obligations for itself, although occasionally it has implied the denial of the obligation itself. Compare the recent refusal of Italy in its claims against Greece to accept the intervention of the League of Nations, as provided in Art. 12 and 15 of the Covenant.

[2] Law essentially implies, within its prescribed field, the dominance of a higher authority, whether exercised by a closely organized body, such as the United States in respect to its member States, or by the more loosely organized community of nations such as existed in 1914. It is the method of their adoption, by voluntary act in each instance, rather than the substance of the rules themselves, which determines their compatibility with sovereignty.

[3] Thus the United States remains free to refuse to be bound by obligations assumed by the members of the League of Nations. Compare the refusal of Secretary Hughes for a period following 1920 to recognize the existence of the League.

CHAP. II

arbiter of its own claims. Sovereignty is here seen in its purest form, as a theoretical position of legal isolation from which the state can be brought to emerge only by its voluntary acts.[1]

Sovereignty *versus* collective responsibility

The exercise by a state of the right of arbitrary decision in questions relating to its vital interests has had, in turn, its effect upon the methods of procedure for the enforcement of national rights. Unwilling or unable to reduce their respective claims to a rule of law, the leading nations entered during the nineteenth century upon a system of competitive armaments which brought them, as a group, to a condition of ill disguised anarchy. Alliances were formed to strengthen the position of weaker nations, and were met in turn by counter-alliances of opposing groups. The unstable equilibrium thus resulting reacted upon the normal claims of the nations and led to more aggressive assertions of national rights. War continued to hold its place as the ultimate arbiter of international disputes in spite of a growing tendency to submit questions of lesser importance to tribunals of arbitration. At the same time, consistently with the recognition of the legality of war, neutrality became the recognized duty, as well as the right, of third parties.[2] There was thus an almost complete absence of a sense of collective responsibility on the part of the community of nations as a whole for the maintenance of international peace. Neither in respect to the enlargement of the scope of international law, nor in respect to the just interpretation and faithful enforcement of such rules as existed, was it found possible to secure concerted action beyond the "beliefs" and "wishes" expressed at the peace conferences of the Hague.[3] The dominant conception of national law, that the protection of the rights of the individual citizen is to be attained by the coöperative action of the community in establishing common agencies of justice, did not enter into the code of international law.

f. The organization of the League of Nations

It is difficult, if not impossible, to determine at the present moment how far the fundamental character of international law as it existed in 1919 has been changed by the establishment of the League of Nations.[4] Taking the League as a working institution, operating under a constitution as yet not given practical effect in

[1] That the term as generally used in international relations is open to serious objections has long been pointed out by scholars. The fact, however, that it is still in official as well as general use makes it impossible to omit reference to it.

[2] See below, p. 519.

[3] See the Final Acts of the Hague Peace Conferences of 1899 and 1907, *Hague Conventions*, 25-30.

[4] For the text of the Covenant of the League, see Appendix A.

all of its articles, it would appear that a new international organization has been created, closer in its legal obligations than the existing society of nations and yet not possessing such powers as to constitute it a federation or "super-state."[1] The purpose of the organization is stated in the preamble to the Covenant as being the promotion of international coöperation and the achievement of international peace and security by the acceptance of obligations not to resort to war, the prescription of open and just relations between nations, the establishment of the understandings of international law as the actual rule of conduct between states,[2] and the maintenance of justice and respect for treaty obligations. Provision is made for the accession of new members other than the original signatories of the Treaty of Versailles, of which the Covenant was made to form the first twenty-six articles (Article 1). The obligations are assumed without time-limit, but withdrawal from the League may take place after two years' notice. The organization consists of an Assembly, a Council, and a Permanent Secretariat (Article 2).[3] The Assembly consists of representatives of all the members of the League, and is to meet at stated intervals, which have been fixed for the first Monday in September of each year. The Council consists of representatives of the five "Principal Allied and Associated Powers," together with six other members selected by the Assembly (Article 4).[4] The Permanent Secretariat is established at Geneva, the seat of the League, and its expenses are apportioned among the members of the League in varying amounts (Article 6).[5]

Functions of the League: legislative and executive

The functions assigned to the League are partly legislative, partly executive, and partly judicial. The legislative functions are vaguely defined, both Assembly and Council being competent

[1] At the opening session of the Assembly the president of Switzerland, as host, felt it necessary to "affirm once more that the League of Nations is not and never will be a super-state which will absorb the sovereignty of states or reduce them to tutelage." The term "super-state" has no definite legal connotation. As popularly understood it would appear to be a federal state with the power to dictate to its individual members. The right of individual veto in the Assembly precludes the possibility of coercion by however large a majority.

[2] For a study of what may be understood by "the understandings of international law," see Q. Wright, *Am. Journal*, XIV (1920), 565.

[3] For a discussion of the respective jurisdictions of the Assembly and the Council, see C. G. Fenwick, "Notes on International Affairs," *Am. Pol. Science Rev.*, XV (1921), 96.

[4] The number originally provided for was four, the Council being given a right to increase the number with the consent of a majority of the Assembly.

[5] See below, p. 139.

CHAP. II

to deal with any matter "within the sphere of action of the League or affecting the peace of the world" (Articles 3, 4); but the decisions of either body require the agreement of all members present at the meeting. The executive functions consist in the maintenance of the general peace and in the supervision of the administrative work intrusted to the League. In providing for the first of these objects the Covenant foreshadows the adoption, if it does not actually mark the adoption, of the principle of collective responsibility on the part of the League as a body for the protection of the rights of its individual members. Article 11 provides that "any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League." Wars and threats of wars have always been a matter of concern to the nations individually; they are here declared to be of concern to the nations in their collective capacity as members of the League. Again in Article 16 it is stated that if any of the contracting parties should break the agreement to arbitrate contained in Article 12 it shall thereby "ipso facto be deemed to have committed an act of war against all other Members of the League." More significant still is Article 10, by which the members of the League pledge themselves "to respect and preserve as against external aggression the territorial integrity and existing political independence of all the Members of the League." The scope of this last clause was officially interpreted by the Assembly at its first meeting as not embodying a guarantee of the *status quo*, but merely securing mutual protection against acts of aggression, pending the submission of the dispute to the League or to arbitration.[1]

Administrative functions

The administrative functions of the League are more specific and tangible. Prior to the establishment of the League international coöperation for objects of general welfare had been limited

[1] At the opening session of the Assembly in 1920 the committee on the admission of new states stated "that Article 10 does not guarantee the territorial integrity of any member of the League. All it does is to condemn external aggression on the territorial integrity and political independence of any member of the League, and calls on the Council to consider what measures to take to resist that aggression." The motion of the Canadian delegation to amend the Covenant by striking out Article 10 was postponed. At the meeting of 1923 an amendment, proposed by Canada, interpreting Article 10 so as to leave each national parliament free to decide upon its obligations to employ force should the Council consider that step necessary to protect the territorial integrity of a state, although reported favorably by the commission on amendments, was defeated by the adverse vote of Persia and the abstention from voting of a number of the smaller and weaker states.

to the formation of numerous "unions" with their separate administrative bureaus and commissions.[1] By Article 24 of the Covenant provision is made that all future bureaus and commissions constituted for the regulation of matters of international interest are to be placed under the direction of the League, while existing bureaus may be placed under its direction if the parties to the several conventions consent. In addition, certain administrative duties are assigned to the Council specifically and to the Permanent Secretariat (Articles 8, 18, 22, 24).

Judicial functions

The judicial functions of the League consist in the competence of the Council to act as a commission of inquiry in all disputes which are not submitted by the parties to arbitration. A report upon the case, agreed to unanimously by the members of the Council other than the representatives of the parties to the dispute, is to have the force of an obligatory award to the extent that the members of the League will not go to war with a state complying with the recommendations of the report. The Council itself, or either of the parties, may refer the dispute to the Assembly, in which case the report of the Assembly, when concurred in by the representatives of states which are members of the Council and by a majority of the other members of the League, exclusive of the parties to the dispute, shall have the same obligatory character as a report of the Council.[2]

[1] See below, p. 65.
[2] See below, p. 417

CHAPTER III

THE DEVELOPMENT OF THE SCIENCE OF INTERNATIONAL LAW

a. Predecessors of Grotius

The great treaty-statute of 1648, which was the corner-stone of modern international law,[1] was accompanied by an equally important, though more gradual, change in the conception of the nature and sanction of international law. During the anarchy of the century preceding the Treaty of Westphalia the traditions of a common law of the nations had never wholly been forgotten. Scholars and publicists lifted up their voices from time to time declaring that the principles of natural justice were binding upon states as well as upon individuals. Victoria, a Spanish theologian, in lectures published in 1557 after his death, laid down the principle that the nations formed a community based upon natural reason and social intercourse.[2] The Spanish Jesuit, Suarez, in a classic passage of his treatise *De Legibus ac Deo Legislatore,*[3] published in 1612, insisted clearly that the states of the world, although independent in their national life, were nevertheless members of the human race and as such subject to a law of conduct; a law based, he held, chiefly upon natural reason, but also in part upon human custom. The Italian jurist, Gentilis, professor of civil law at Oxford, published in 1598 a treatise, *De Jure Belli,*[4] in which, without discarding natural reason and natural law, he sought to find historical and legal precedents to regulate the conduct of nations. The honor was reserved, however, to Hugo van Groot, better known as Grotius, to publish in 1625 a more formal treatise, *De Jure Belli et Pacis,*[5] which was the first to obtain a hearing outside the schools and which won for its author the title of the Father of International Law.

[1] See above, p. 19.

[2] *De Indis et de Jure Belli Relectiones, passim.* Text of 1696, and translation by J. P. Bate. Carnegie Institution of Washington, 1917.

[3] The passage is quoted, in Latin, by Walker, *History of the Law of Nations,* 155-156; and in English by Westlake, *Collected Papers,* 26.

[4] Walker, *History,* 252-274.

[5] The edition of 1646, photographically reproduced, was published by the Carnegie Institution of Washington, 1913. The standard, though abridged, translation is that of Whewell, Cambridge, 1853. A new translation by Kelsey, Sanders, Boak, and Reeves, *The Law of War and Peace,* to be published by the Carnegie Endowment for International Peace, is in press.

b. The Grotian system

Grotius followed the traditions of his time in making the natural law the basis of his system. The "natural law," as he defined it, was "the dictate of right reason which points out that a given act, because of its opposition to or conformity with man's rational nature, is either morally wrong or morally necessary, and accordingly forbidden or commanded by God, the author of nature." [1] Since nations formed a society similar in its nature to the community of citizens, they too were bound by the dictates of the natural law. What these dictates were might be discovered in either of two ways: by arguing *a priori* that a given act was or was not in accordance with the fundamental moral principles without which human society could not exist, or by examining the common practices of the nations and inferring, with a lesser degree of certainty, that principles of conduct accepted by all or by the more civilized peoples must have their origin in the natural law. In addition to the natural law Grotius recognized a voluntary law of nations based upon their free consent, whether explicit, as expressed in treaties and conventions, or implicit, as expressed in usages and customs. To this law he gave, somewhat incorrectly, the name *jus gentium*.[2] In so far as it conformed to the dictates of right reason, the voluntary law might be said to blend with the natural law and be indeed the expression of it. Should there be a conflict between the two, the law of nature was to prevail, as being the fundamental law, the authority of which could not be contravened by the practice of nations.[3]

Justification of the appeal to the natural law

The basis upon which Grotius built up his system is of importance in the development of international law because of the far-reaching influence which the theory of the natural law exerted upon the writers of the following centuries. The criticism, now become obvious, of a system built upon the natural law is that men have at all times differed as to the detailed rules which are deducible from that law. To Grotius, however, the principles of the natural law were "of themselves patent and evident, almost in the same way as things which are perceived with the external senses." [4] But the pains he took to quote from the philosophers, poets, and

[1] Bk. I, Chap. I, § X.

[2] *Ibid.*, § XII. Victoria appears to have used the term in the same sense a century earlier.

[3] For a study of the influence of Grotius upon contemporary and later thought, see Vreeland, *Hugo Grotius.* Also, *Transactions of the Grotius Society*, I-VII (1922), *passim.*

[4] *Op. cit.*, Prolegomena, § 39, Whewell's translation.

CHAP. III

statesmen of all ages in proof of the morality of a given act suggest that even in Grotius's mind there was some doubt as to the obviousness of the moral law, or at least as to its concrete application to the facts of international life.[1] On the other hand it was impossible for a writer of the time of Grotius to present a positive system of international law based upon the actual practices of the nations. It was the very fact that the conduct of the times was lawless and unrestrained that led Grotius to appeal to a higher law of natural justice superior to the arbitrary conduct manifested in the existing practices of the nations.[2] The success of this appeal was seen in the general acclaim with which his volume was received. Practical statesmen felt the need of putting some restraint upon the barbarous practices of the times, and were ready to accept the statement of lawful and unlawful conduct laid down by Grotius without giving more than a formal adherence to the basis upon which it was constructed.

Richard Zouche

Two years after the Peace of Westphalia a second, though much smaller, treatise was published which deserves a place among the important influences determining the development of the science of international law. Richard Zouche, who held the chair of civil law at Oxford, published in 1650 a manual of international law in which the term *jus inter gentes* was substituted for the *jus gentium* of Grotius, and stress was laid upon custom as a source of international law.[3] By reason of his more concrete point of view Zouche is regarded by some writers as the founder of what is called the "positive" or "historical" school of international law. But Zouche was still a citizen of the seventeenth century and influenced by its need for a higher standard of conduct than could be found in the common practices of the nations. Hence he defines *jus inter gentes* as "the law which is accepted among most nations

[1] The agreement upon general principles of justice presents little difficulty; it is the application of principles to concrete facts, the existence of a right under specific circumstances, that forms the arena of controversy.

[2] Grotius tells us that his reason for writing his treatise was that he "saw prevailing throughout the Christian world a licence in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint." Prolegomena, § 28, Whewell's translation.

[3] A photographic reproduction of the text of 1650, *Juris et Judicii Fecialis, sive, Juris inter Gentes, et Quæstionum de Eodem Explicatio*, edited by T. E. Holland, with translation by J. L. Brierly, was published by the Carnegie Institute of Washington, 1911.

by customs in harmony with reason,"[1] and he does not hesitate to lay down dogmatic rules for which the incidents cited are rather examples than evidence.

c. Schools of international law: the Naturalists

From the time of Zouche down to the close of the nineteenth century international law developed gradually from a science that was largely theoretical into a predominantly practical one. There were fluctuations to and fro, but the general progress can be clearly marked. Three distinct tendencies may be observed, which have led historians to group the successive writers into separate schools of thought. On the one hand, there were writers who placed a greater emphasis upon the law of nature than even Grotius himself had placed. Pufendorf, a university professor first at Heidelberg and later at Lund in Sweden, published in 1672 a work, *De Jure Naturæ et Gentium,* in which he relied solely upon the natural law as determining the standard of international conduct, and denied the legal validity of any rule based upon custom and treaty. But these views did not meet with any wide acceptance, and while Pufendorf has been placed by historians at the head of what has been called the Philosophical or Pure Law of Nature school, there are but few distinguished names among those who have carried on his theories. Thomasius, Barbeyrac, Burlamaqui, and Rutherford are counted among his followers, and within more recent years James Lorimer, whose *Institutes of International Law,* published in 1883-84, is a conspicuous survival of an approach to the law now generally regarded as largely speculative.

The Grotian school: Vattel

The system established by Grotius held its own against the effort to make of international law a largely theoretical science. A group of writers, which has been given the name of the Grotian School, maintained the dual authority of the natural law and of custom and convention, although they ceased to give predominant weight to the former. The chief representative of this school was the Swiss jurist, Emer de Vattel, whose name, owing to the practical use made of his treatise by statesmen, is even better known in the world of international relations than that of Grotius. Vattel undertook to popularize a volume entitled *Jus Gentium,* published in 1749 by the German philosopher, Wolff.[2] To his work he gave the title *Le Droit des Gens,* with the sub-title, "Principes

[1] *Op. cit.,* 1.

[2] The volume forms the ninth and last of a larger treatise on *Jus Naturæ.*

CHAP. III

de la loi naturelle, appliqués a la conduite et aux affaires des nations et des souverains.'' [1] Vattel's system of international law began with a recognition of the state as a corporate person having an understanding and will of its own and susceptible at once of obligations and of rights. He then argued, following the theory of primitive society accepted at the time, that ''as men are subject to the laws of nature, and as their union in civil society cannot exempt them from the obligation of observing those laws, since in that union they remain none the less men, the whole nation, whose common will is but the outcome of the united wills of the citizens, remains subject to the laws of nature and is bound to respect them in all its undertakings.'' [2]

The law of nature applied to nations

The next step was to apply the law of nature in a proper and scientific way to the conduct of nations and of sovereigns; and the result was international law.[3] But who was to be the interpreter of this application of the law of nature to nations? On the one hand, there were certain matters in which right and wrong stood out clearly, so that there could be no doubt as to the principle of law involved, and to such rules Vattel gave the name of the ''necessary (or natural) law of nations.'' On the other hand, in the absence of a supreme authority capable of deciding between nation and nation, there were cases in which the application of the law of nature was not clear and consequently in which each nation must be allowed its own interpretation of the law of nature, with the result that the precepts of the law might be evaded by a nation, yet without the commission of a positive injury against the other party. These rules Vattel designated by the name of the ''voluntary law of nations.'' In addition to these two forms of the law of nations Vattel recognized the existence of treaties in the form of ''conventional law,'' and the existence of usages which constituted ''customary law.'' But there must be no conflict between either conventional or customary law and the necessary law, since nothing could obligate a nation to violate the law of nature.[4] Vattel's method, therefore, was entirely deductive. If the practice of nations was frequently quoted in support of a given proposition, it was merely because Vattel regarded it as

[1] The text of the edition of 1758 photographically reproduced, edited by A. de Lapradelle, with English translation, was published by the Carnegie Institution of Washington, 1916 (''Classics of International Law'').

[2] *Op. cit.*, Introduction, § 5.

[3] *Op. cit.*, Preface, vi.

[4] *Op. cit.*, Introduction, §§ 24-26.

confirming the truth of a rule that he had already established *a priori*. The real test of the lawfulness or unlawfulness of a given act was always its conformity with the law of nature.

The system proposed by Vattel is elaborate and complex, but it is important because of the great influence exercised by him upon the subsequent development of international law. No name was quoted more often than his during the century following the publication of his treatise. Judicial tribunals relied upon his authority, statesmen referred to him for arguments and precedents, and political philosophers were consciously or unconsciously influenced in their writings by him. If within recent years his name has passed into the remoter field of the history of international law, his system still dominates the thought of Latin Europe.[1]

The Positivists

A third group of writers has been classified as "Positivists" or the Positive School. The emphasis placed by Zouche upon the customs of nations was pressed still further by Bynkershoek, a Dutch publicist, whose works, published in 1702-37, covered only a portion of the field of international law. For the law of nature he substituted *reason,* which, together with usage, constituted the two sources of international law.[2] But permanent usage would appear to embody the dictates of reason; it represented the collective reason of successive generations and of various nations; and in consequence it imposed a reciprocal obligation as if such usage were based upon mutual consent.[3] In this way Bynkershoek was enabled to appeal directly to custom in support of certain claims, and he even went so far as to assert in one place that there was no law of nations except between those who voluntarily submitted to it by tacit convention.[4] John Jacob Moser, a voluminous German writer of the middle of the eighteenth century, pointed the way to the more modern conception of international law by concerning himself solely with the accumulation of treaties and usages which, in the form of precedents, gave a positive character to international law.[5] A similar service was performed by George Friedrich de

[1] For further details of Vattel's system and an estimate of the extent of his influence upon writers and upon governments, see the introduction, by A. de Lapradelle, in the edition published by the Carnegie Institution of Washington, 1916; also "The Authority of Vattel," by C. G. Fenwick, *Am. Pol. Science Rev.,* VII, 395; VIII, 375.

[2] *Quæstiones Juris Publicæ,* Lib. I, Cap. 10.

[3] *De Foro Legatorum,* Cap. III, § 10.

[4] *Ibid.,* Cap. XIX, § 6.

[5] Nys considers him, by reason of his historical labors, as worthy to be regarded as one of the "founders of international law." *Le Droit International,* I, 258.

CHAP. III

Martens, professor at Göttingen, whose *Précis du Droit des Gens Moderne de l'Europe* appeared in 1788.[1]

d. Character of recent treatises: British

During the course of the nineteenth century and the opening years of the twentieth the progress of international law was marked by the increasing, and finally predominating, influence of the positive school. A number of writers still referred to the law of nature as the ultimate test of international justice, but usage and convention, now grown large in bulk, preoccupied the attention of the jurist. In Great Britain Sir William Scott, afterward Lord Stowell, as judge in the British High Court of Admiralty, gave to the law of prize in time of war the definiteness of a positive system, and incidentally delivered valuable dicta upon other branches of the law. Manning, in *Commentaries on the Law of Nations,* published in 1839, followed the old classification of the "natural" and the "positive" law of nations, and after the true Grotian tradition said that "customary law should be tested by the law of nature."[2] Phillimore, whose *Commentaries on International Law* were first published in 1854, spoke of custom and usage as outwardly expressing "the consent of nations to things which are *naturally,* that is by the law of God, binding upon them."[3] Hall, whose text on *International Law,* published in 1880, is accounted one of the best reasoned of the modern treatises, was strictly positive in adopting "the existing rules" actually in force between nations as the "sole standard of conduct or law of present authority."[4] His positive attitude dominates the field of more recent British thought, as presented in the works of Lawrence, Walker, and Westlake. Oppenheim, while equally explicit in laying down that "only a positive law of nations can be a branch of the science of law," indulges freely in critical comment based upon general principles of justice.[5]

American

In the United States James Kent, the first of American publicists to attempt a connected statement of the rules of international law, took a definite stand in favor of the consent of nations

[1] The publication of Martens's volume on the eve of the French Revolution makes it a landmark of progress up to the time of that great crisis.

[2] *Op. cit.,* 57, 69.

[3] *Op. cit.,* Preface, v.

[4] *Op. cit.,* Introductory Chapter.

[5] *International Law,* 3rd ed., 1920, I, § 59. Oppenheim, although of German birth and education, wrote his important treatise while a professor at the London School of Economics and at Cambridge University, and he is therefore classed here among British writers. For an appreciation of his scientific attainments, see *British Year Book of International Law,* 1920-21, 1-9; *Am. Journal,* XIV (1920), 229.

as furnishing the only positive basis of international law.[1] Henry Wheaton, whose *Elements of International Law*, published in 1836, exercised an important influence both in England and in the United States, followed more closely the Grotian tradition, and gave due place to deductions from general principles.[2] The judicial decisions of Chief Justice Marshall[3] and of Justice Story show a similar tendency to fall back upon general principles of justice where the inference from usage and custom is not convincing. Succeeding writers either reaffirm the traditional attitude of the Grotian school, as in the case of Francis Lieber[4] and Theodore D. Woolsey,[5] or in more recent years confine their attention, as in the case of Davis,[6] Wilson,[7] Stockton,[8] and Hershey,[9] more exclusively to the restatement of general usage and the description of the growing body of international conventions. John Bassett Moore's *Digest of International Law*, published in 1906, is of special importance as setting forth in a wide variety of official documents the international practice of the United States.[10] It must be noted, however, that on many points the *Digest* represents the American interpretation of international law rather than the generally accepted rules. Charles Cheney Hyde's recently published work on *International Law, Chiefly as Interpreted and Applied by the United States*, is an exhaustive study of the subject within a similarly limited field. To these leading treatises must be added the voluminous publications,[11] original and editorial, of James Brown

[1] *Commentaries on American Law*, I; published in 1826.

[2] Wheaton defines international law "as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent." *Op. cit.*, ed. 1866, § 14. The latest English edition of Wheaton is that by Coleman Phillipson, 1916.

[3] See, for example, the decision in Schooner Exchange *v.* McFadden, below, p. 201.

[4] *Miscellaneous Writings*, 2 vols., 1881. See also, *Instructions for the Government of the Armies of the United States in the Field*, below, p. 74.

[5] *Introduction to the Study of International Law*, 6th ed., 1899.

[6] *Elements of International Law*, ed. 1916.

[7] *Handbook of International Law*, 1910.

[8] *Outlines of International Law*, 1914.

[9] *Essentials of International Law*, 1912.

[10] The work in seven volumes and index, while based upon an earlier *Digest* by Francis Wharton, 3 vols., 1886, contains so large a body of original research study as to constitute an independent undertaking.

[11] The most important of these are perhaps: *The Hague Peace Conferences of 1899 and 1907*, 2 vols., 1909; *Cases on International Law*, 1906; revised ed. 1922; *The United States of America: A Study in International Organization*, 1920; *Judicial Settlement of Controversies between States of the American Union: an Analysis of the Cases Decided in the Supreme Court of the United States*, 1919.

CHAP. III

Scott, whose theories with respect to international procedure have had a wide influence.

German

German writers, like those of Great Britain and the United States, show a predominantly positive conception of the nature of international law. Klüber, who published in 1819 a volume in French entitled *Droit des Gens Moderne de l'Europe,* was still influenced by the theory of the natural law to the extent of having recourse to it to fill the gaps in the positive law and to give unity to its principles.[1] Heffter, whose volume, *Das Europäische Völkerrecht der Gegenwart,* appeared in 1844, was more positive in his attitude, discarding metaphysical speculation and seeking merely to present a clear and precise picture of the actual customs and treaties in force between nations.[2] Bluntschli, in the introduction to his *Code* published in 1868,[3] frankly stated that it was his intention "to formulate clearly the existing ideas of the civilized world."[4] This position is confirmed by the more recent standard texts of von Liszt[5] and von Ullmann.[6] A similar attitude is to be observed, on the whole, in the works of the Swiss, Dutch, Scandinavian, and Russian publicists, among whom may be mentioned Rivier,[7] de Louter,[8] Kleen,[9] and Martens.[10]

Continental-European and Latin-American

On the other hand there is still manifest, principally among French, Italian, Spanish, and Latin-American writers, a tendency to refer to theories of absolute right as the ultimate source of law, although this attitude is often combined, as in the case of Bonfils[11] and Despagnet,[12] with an exhaustive study of international prac-

[1] Preface, Chap. I, § 5. Additional value attaches to Klüber's work by reason of its being representative of progressive thought at the time of the Congress of Vienna.

[2] Fourth edition, in French translation, edited by Geffken, 1883. Rivier commends Heffter as the best survey of the entire subject. Holtzendorf, *Handbuch,* I.

[3] *Das Moderne Völkerrecht der Civilisirten Staaten als Rechtsbuch Dargestellt,* 3rd ed., 1878.

[4] See below, p. 72.

[5] *Das Völkerrecht Systematisch Dargestellt,* 10th ed., 1915.

[6] *Völkerrecht,* 2nd ed., 1908. The post-bellum treatises of Nippold and Niemeyer are distinctly constructive. See below, p. 60.

[7] *Principes du Droit des Gens,* 2 vols., 1896.

[8] *Het Stellig Volkenrecht,* 2 vols., 1910; translated into French by the author under the title *Droit International Public Positif,* 1920.

[9] *Lois et Usages de la Neutralité,* 2 vols., 1898-1900. Kleen was, however, alive to the need of reforms in the law.

[10] *Traité de Droit International,* 3 vols., 1883-1887. Translated from the original Russian.

[11] *Manuel de Droit International Public,* 7th ed. by Fauchille, 1914. The 8th edition appears under the name of Fauchille, *Traité de Droit International Public,* Vol. II, 1921, Vol. I, Part I, 1922.

[12] *Cours de Droit International Public,* 4th ed. by de Boeck, 1910.

tice as showing the concrete application of abstract principles. The important treatise by Calvo, an Argentine jurist, first published in Spanish in 1868 and later in French,[1] combines theoretical speculation with detailed evidence of international practice. The volume by Alvarez, *Le Droit International Américain,* published in 1910, represents an attempt on the part of a Chilean publicist to delimit a field of American relations in which special rules of law are held to apply.[2]

Results of the positive attitude toward international law

The development of international law from a theoretical science, based upon abstract reasoning, into a practical science, based upon ascertainable facts of international usage, had the effect of making the law at once more definite and less elastic. On the one hand, a clear-cut separation was made between what *was* the law, in the sense of rules actually observed, and what under other conditions *might* or *should* be the law according to the conception of international justice held by the individual writer. The plain record of international practice furnished a definite starting-point in the settlement of many international controversies. The precision of the law within one field led to its extension into other fields. New and closer relationships were being developed between the nations, calling for a more specific understanding of the force to be attributed to usage and precedent and for a wider application of general treaties and conventions.

On the other hand, the science of international law lost almost entirely its critical and constructive character. Writers were more intent upon weighing conclusions from facts than upon criticizing either the facts themselves or the political and economic basis upon which they rested. There was a strong tendency on the part of publicists to rally to the defense of national interests and to be advocates rather than judges in the interpretation of disputed points. Cases were sometimes quoted as arguments rather than as evidence. It was not thought consistent with scientific method to point out the wide gaps in the law or the defects of its underlying principles. The constructive work of international reorganization was regarded for the most part as beyond the scope of legal study. International jurisprudence remained a neglected field.

The disillusionment in respect to the value of the existing rules

[1] *Le Droit International Théorique et Pratique,* 5th ed. in 6 vols., 1896.

[2] A critical bibliography of the more important works on international law may be found in Nys, *Le Droit International,* I, 251-328. A briefer survey may be found in Oppenheim, *Int. Law,* I, §§ 52-62.

CHAP. III

The new constructive literature

of international law which attended the outbreak of the World War was followed by a time of earnest endeavor to discover both the cause for the collapse of the existing system and the remedy for the future. The attention of publicists was given to constructive plans for the reëstablishment and development of international law at the close of the war. A new international law was visualized under which war was to be outlawed as a means of procedure and a general association of the nations formed to maintain peace.[1]

With the establishment of the League of Nations, by the opening articles of the several peace treaties, the leading foreign publicists and a number in the United States gave their support to that institution as containing the best promise of the future, and their writings reflect their interest in its successful operation.[2] Other American publicists found the League an unsatisfactory basis for the establishment of the new international law, either because of its connection with the Treaty of Versailles, or because of the inadequacy of its powers to accomplish its purposes, or because of inherent defects in its organization and functions.[3] Most of this latter group, however, have found it possible to give their support to the Permanent Court of International Justice as an initial step toward the substitution of law for force in international relations.[4] The general outcome of recent scientific study in the field of international law, therefore, has been a large body of more or less ephemeral writings dealing with the codification of international law and the possibility of enlarging its scope and strengthening its authority. International jurisprudence appears about to enter upon a second stage in which constructive plans for the amendment of the law will largely replace the analysis of existing rules.

[1] The literature is extensive, including such volumes as Fried, *The Restoration of Europe*, 1916; Brailsford, *A League of Nations*, 1917; Minor, *A Republic of Nations*, 1918; Oppenheim, *League of Nations*, 1919; Dickinson, *The Choice before Us*, 1918; Hill, *The Rebuilding of Europe*, 1917. For a bibliography, see Potter, *Introduction to International Organization*, Appendix B, §§ 26-27.

[2] Here also the literature is extensive. See, in particular, Lawrence, *The Society of Nations*, 1919; Pollock, *The League of Nations*, 1920; Lammasch, *Völkerbund oder Völkermord;* Duggan, ed., *The League of Nations: the principle and the practice;* Hicks, *The New World Order*. For a bibliography, see Potter, *op. cit.*, Appendix B, §§ 27-28. Nippold's *Development of International Law after the World War* (trans. from the German edition of 1917) and Niemeyer's *Völkerrecht*, 1923, are both largely concerned with the development of new and more adequate rules.

[3] See, for example, Snow, *The American Philosophy of Government*, 1921; Hill, *American World Policies*, 1920.

[4] See *Am. Journal*, XV-XVII (1921-23), *passim*.

CHAPTER IV

THE DETERMINATION OF THE CONTENT OF INTERNATIONAL LAW

a. Sources of international law

The use of the term "sources" has given rise to much confusion among writers on international law, some interpreting the word to include the *causes* of international law, i.e., the forces in international relations which have led to the establishment of rules of law, others interpreting it as meaning the *evidences* which bear witness to the existence of certain rules, while still others regard as sources of law the historical facts of international life which appear to embody an agreement of the nations to be bound by a given rule.[1] In the last instance the sources of the law and the law itself are identical in substance, the only difference between the two being that one designates the existence of certain facts while the other explains the meaning or principle underlying those facts. International law, as has been shown, is a rule of conduct arising out of an agreement between states. The question arises, what facts of international life bear witness to the presence of such an agreement; or, in other words, from what facts can it be inferred that a rule of conduct is recognized? These facts are the primary "sources" of the law.

Custom as a source of international law

Owing to the absence of an international legislative body capable of expressing the explicit collective will of the members of the community of nations, the chief source of international law is the body of customs which have developed through succeeding centuries and which express the implied consent of the nations observing them. Rules of customary law have their origin in the free practice of individual nations; then in time other nations are led from various motives to adopt the same practice until a well defined usage has grown up, which in its turn slowly hardens to a custom possessing a recognized legal standing.[2] The international law of custom thus bears an analogy to the English common law,

[1] Oppenheim, *International Law*, I, § 15.

[2] The distinction between usage and custom is pointed out by L. B. Evans, "The Primary Sources of International Obligations," in *Proceedings*, Am. Society of Int. Law, 1911, 257 ff., where the general subject is critically discussed.

CHAP. IV

drawing its authority from settled lines of conduct and testing the justice of a particular claim not by principles of abstract justice but by the precedents of the past.[1] So well established is the force of customary law that new states entering the community of nations are held to be bound by the law as one of the implied conditions of their admission.[2]

General principles and concrete practices

The nature of customary international law will be better understood if a distinction be made between rules which exist in the form of general principles and rules which exist in the form of concrete practices. Certain general principles of conduct, identical with or closely analogous to principles regulating the conduct of individual citizens, have been acknowledged by states almost universally in modern times, many of them tracing their origin to a remote antiquity. Such is the rule of *good faith* between nations,[3] which, like the similar rule of municipal law, lies at the very basis of the collective agreement of nations to be bound by a rule of law. While this rule in its general form is a product not so much of custom in the strict sense as of intuitive reason or moral conscience, the application of the rule to the circumstances of international relations has become a definite part of customary law. Precedents may therefore be quoted to determine, for example, whether the refusal to abide by a treaty when conditions have essentially changed, or whether a declaration of war made without due notice constitutes a breach of good faith.[4] The same is to be said of many of the rules bearing upon the fundamental rights of states. On the other hand, customary international law embraces numerous rules of lesser importance, in respect to which the original general principle, if there was one, has been largely lost sight of, and the test of their validity depends strictly upon past practice. Such, for example, might be the rule by which the marginal sea is brought within the territorial jurisdiction of a maritime state.[5]

Defects of custom as a source of international law

One of the chief causes of disputes between foreign offices as to the existence of an alleged rule of international law has been

[1] In the case of the *Paquete Habana*, 175 U. S. 677 (1899), the court offered, as evidence of the existence of an established rule of law, a "review of the precedents and authorities on the subject." See below, p. 68.

[2] See below, p. 76.

[3] See below, p. 319.

[4] These customary inferences from general principles are doubtless what have led certain writers to regard "reason" as one of the sources of international law. See Westlake, *International Law*, 2nd ed., I, 14-15.

[5] See below, p. 250.

due to the inherent defects of custom as a source of international law. In the first place, customary international law has been an uncertain law. It is the culmination of a series of acts regularly observed and of principles consistently followed. But in the absence of a central court of the nations authorized to decide according to precedent, the nations have often been at a loss to agree upon the number of reiterated acts which constitute regular observance or the frequency of the appeal to principle necessary to show general acceptance. The small number of cases presenting substantially the same facts has added to the difficulty of deducing a common rule from them.[1] In the second place, customary law has been of too slow growth to keep pace with the changing relations of the states which it endeavors to regulate. International law has in many important features lagged far behind the newer phases of international relations brought about by the transition from autocratic to democratic national governments and by the increasing complexity of international finance and trade. The laws of war, paradoxical in themselves, have regularly been violated in their existing form before being amended to meet new conditions.[2] In the third place, customary law, being based upon precedent, has been unable to fill up the gaps in international law as these are disclosed by the development of clearer conceptions of international justice. Many of the important reforms of international law have come about by the action of a single state or a group of states asserting claims not previously admitted, and maintaining them in the face of opposition, until at last inherent justice and physical pressure have succeeded in winning general recognition of the claims as legal rights.

Treaties as a source of international law

In contrast to custom as embodying implied consent, a further source of international law is to be found in the various treaties which embody the express consent of the members of the community of nations. It must be noted, however, that treaties are sources of international law only when adopted by the nations as a body. Treaties between two individual states are law as between

[1] When, for example, the United States argued before the Geneva Arbitration Tribunal that it was the duty of a neutral state to prevent its ports from being used as a base of supplies for its enemy and as the starting-point of hostile expeditions, counsel could present no earlier cases in which that duty had been recognized under sufficiently similar circumstances to warrant an inference of legal obligation. The general principle appeared correct; its application to the particular facts, although logical, was nevertheless not supported by precedent.

[2] See below, Chap. XXXII, a-c.

CHAP. IV

the parties, but can obviously create no obligations on the part of other states. They have been called, for want of a better name, "particular international law." They are no more than contracts between two parties looking to their separate interests, as in the case of private contracts between citizens under municipal law. If, however, similar bilateral agreements are entered into by all the states of the world taken two by two, as in the case of extradition treaties, a point is reached where such treaties become practically equivalent to a source of international law.

Of a distinctly different character are the so-called "law-making" treaties, such as the Declaration of Paris of 1856, entered into originally by a small group of powers acting in their collective interest, and containing a clause inviting other nations to adhere to the rules laid down in them. When the transition from limited agreements to general agreements has been duly effected by the subsequent adhesion of a large number of states, such treaties become a true source of international law.[1]

Conventions of the Hague Peace Conferences

The meeting of the First Hague Conference in 1899[2] gave a more definite and recognized position to treaties as a direct, if not an immediate, source of international law. At this conference important agreements, technically called "conventions," were entered into, which gave universal application to certain existing usages of limited practice, abolished certain others, prescribed new rules of international conduct, defined rights, and imposed definite obligations. The Hague Conference of 1907, attended by practically the entire body of states, went still further in concluding general conventions, though as in the case of the Conference of 1899 the agreements relate for the most part to the conduct of war. Several qualifications must, however, be made in respect to the Hague conventions as sources of international law: first, they became binding only upon ratification by the several states acting individually; second, the condition attached to these conventions, to the effect that they might be at any time denounced by the parties to them upon giving due notice, must be expressedly or impliedly waived before they can be considered as settled law; and,

[1] The Geneva Convention of 1864 is an instance of a similar treaty adopted by a group of powers and subsequently adhered to by practically all states. The Declaration of St. Petersburg, although adopted by a considerable number, failed to win general acceptance. See below, pp. 502; 463.

[2] With exception of the United States and Mexico, the American republics were not represented.

third, certain of them are not binding even between the powers that have signed and ratified them in case third states, not parties to the convention, become involved.[1] It must be noted that many of the provisions of the Hague conventions merely codified existing custom; and in consequence the rule so codified continued to be binding as custom, even where the formal convention failed of ratification or where it came to be denounced after having been ratified.[2]

Conventions relating to general interests

In addition to the conventions of the Hague conferences there is the large body of international conventions which have been adopted from time to time by congresses and conferences called to secure an agreement upon particular matters of the general welfare of the international community. The characteristic feature of these conventions is the fact that they deal for the most part with economic and social interests common to the nations without distinction, and that the objects sought by them have required as a rule the establishment of administrative commissions to carry out the general policies agreed upon in the convention. Instead of seeking to regulate the conflicting claims of nations, these conventions are concerned with the promotion of the public good, and they may be distinguished from treaties having the former object in much the same way as national legislation for the general welfare is distinguishable from the legislative enactments constituting "private law," dealing with the rights of individual citizens. In most cases the convention has created what is known as a "union" or association of the contracting powers for the furtherance of the particular object of the agreement. Its administrative organ consists of a bureau or commission, having a fixed personnel, permanent in character and supported by pro-rata contributions from the member states of the union.

Scope of economic and social conventions

The number of these conventions multiplied rapidly during the last quarter of the nineteenth century. Conspicuous among them before 1914 were the Universal Postal Convention of 1906, replacing earlier conventions, the International Metrical Convention of 1875, the Convention for the Protection of Industrial Property of 1883, the Convention for the Suppression of the African Slave Trade of 1890, the International Sanitary Conventions of 1903

[1] The failure, for example, of Serbia to ratify the several Hague conventions relating to the conduct of war had the effect in 1914 of rendering the conventions technically not binding upon the other belligerents who had ratified them. See below, p. 432.

[2] See below, p. 433.

CHAP. IV

and 1913, the Agreements for the Suppression of the White Slave Traffic of 1904 and 1910, and the White Phosphorus Convention and the Convention Prohibiting Night Work of Women of 1906.[1]

Since 1919 the number of these general conventions has continued to grow. Sixteen distinct labor conventions have been adopted, pursuant to the agreement contained in Article 23 of the Covenant of the League of Nations. Two important conventions were adopted at Barcelona in 1921, one dealing with mutual freedom of transit across land territories and the second dealing with similar freedom over international waterways. A supplementary White Slave Convention was adopted in 1921. In addition there are the treaties for the protection of minorities, which, being entered into with the signatory states of the several peace treaties, approximate to the status of general conventions. Finally, there are the administrative measures taken by the League of Nations directly, looking to such matters of general welfare as international sanitation, the suppression of the opium trade, and the protection of minorities.[2]

b. Evidences of international law

Distinct from custom and treaties as sources of international law are the "evidences" of international law, the documentary material bearing witness to the existence of particular rules. Owing to a confusion among writers as to the proper use of the term "sources," the evidences of the law have frequently been classed as sources, and they might perhaps be not inaccurately described as "secondary sources." The most conspicuous of these evidences are the texts of international law-making conventions, with the qualifications above noted that they are conditionally rather than absolutely binding and that they codify to a large extent customs which would be law independently of the formal agreement. More important evidences, because of their greater scope, are the historical documents which contain the record of international practice and of the negotiations attending the settlement of disputed rights. Among these documents the records of the foreign offices of the several states must be given first place, although they are not in many cases accessible source material for the investigator. Within recent years the official publications of the nations have greatly increased in volume, so that nowadays

[1] See Reinsch, *Public International Unions;* Oppenheim, *International Law,* I, §§ 581-596; Potter, *International Organization,* Chap. XVII; Woolf, *International Government,* Part II.

[2] See *Handbook on the League of Nations, 1920-1923.*

the student has at his disposal not only collections of treaties, but volumes of official correspondence, as well as decrees, proclamations, special instructions to the various branches of the government, statements bearing upon international relations, etc.[1] When these records of the leading states are collected and compared it is possible to deduce from them, with some degree of finality, the existing rule of law.

Works of publicists as sources of international law

In consequence of the difficulty of access to the primary source material of international law, the most available evidences of international law are the works of jurists and scholars who have undertaken to compile the rules of international law in force at the time of their writing. So important were the works of jurists in the earlier stages of international law that a number of them may be classed as direct sources of international law. The great treatise of Grotius would have fallen short both of the author's high purpose and of the world's needs had he been content to do no more than record the actual practices of the nations. The urgent task, as he felt, was not to set forth the uncertain and unjust usages of the time, but to lay down better rules of conduct based upon inferences from moral principles acknowledged in the abstract but consistently violated; and his appeal from existing practice to the ideal conduct was so forcible that his words became authoritative, and statesmen relied upon his judgments as the correct inference from accepted general principles. The treatise published by Vattel in 1758 won for itself the approval of statesmen as a correct statement both of abstract rules and of concrete practices; it became the reference-work of foreign offices, and was quoted with finality in diplomatic negotiations and in the decisions of national courts.[2]

Works of publicists as evidences

Since the eighteenth century the works of publicists have been limited more strictly to the part of evidences of international law. These writers, said Wheaton, writing in 1836, "are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary

[1] Moore's *Digest of International Law* is one of the most valuable collections of such documents, showing the interpretation and application of international law by the United States. During the World War the practice was followed by the several states of issuing official "white," "blue," "red," and other colored "books" containing diplomatic correspondence and governmental decrees and pronouncements.

[2] See above, p. 53.

CHAP. IV

principles."[1] A sentence from the opinion of the Supreme Court of the United States in the case of the *Paquete Habana*[2] has become almost classical. The question at issue was the legality of the capture during the Spanish-American War of certain enemy fishing-vessels which it was alleged were exempt from capture by international custom. After an elaborate review of international practice in favor of such exemption and of the authorities supporting it, Justice Gray, referring to the works of jurists and commentators as witnessing the customs and usages of civilized nations, stated, "Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." The works of great writers must, however, be used with the caution that they often fail to distinguish sharply enough between rules that have been generally adopted by the nations as a body and those to which two or more nations, their own included, have given their consent. Moreover, many writers are inclined to adopt the rôle of advocates in the endeavor to show that the practice of their own country is the correct rule of law on controversial questions. An exception must be made on both these points in favor of some of the more recent university text-books, in which a conscious effort is made to state the existing law impartially.

Decisions of international courts

Other evidences of international law, to be used with even greater caution than the works of great writers, are the decisions of international and national courts. In the case of the former, it must be observed that their jurisdiction, being purely voluntary, has in each instance arisen out of an agreement, known as a *compromis*, entered into by the parties defining the issue and at times laying down the principles by which it is to be decided.[3] The decisions of international arbitration courts, therefore, do not always, even in intent, represent the application of the rules of customary international law. Moreover, arbitration courts are not bound by the decisions of former courts as precedents, although the cases submitted to arbitration in the past have related to so wide a range of subjects that there has been no opportunity of testing the weight that might of option have been attributed to previous cases. With these qualifications the decisions of international courts may be accepted not merely as evidences of an interpretation of interna-

[1] *Elements of International Law*, § 15.

[2] 175 U. S., 677, 700 (1900). Scott, *Cases*, 12; Evans, 19, 602.

[3] See, for example, the Three Rules of the Treaty of Washington, adopted for the guidance of the Geneva Arbitration Tribunal. Below, p. 564.

tional law acceptable to the parties to the dispute, but at times as sources of a new rule of conduct.[1] Such was the effect intended by the states creating the new Permanent Court of International Justice, which they expected not merely to develop judicial traditions governing its own future awards, but to lay down principles which by reason of their intrinsic justice might commend themselves to the international community for adoption as law.[2]

Decisions of national courts

With respect to the judgments of national courts, and in particular of national prize-courts, it is important to observe that they represent merely the decisions of domestic tribunals upon the points of law involved, and even when not controlled by enactments of the national legislature they tend to reflect the local interpretation of general principles. But in so far as national courts undertake to establish the true rule of international law to be applied to the case before them, their method of reasoning and their display of historical learning will have the same value as evidence of the law, and a corresponding influence upon the development of it, as the works of international jurists above mentioned. In the case of Thirty Hogsheads of Sugar *v.* Boyle [3] Chief Justice Marshall laid down the rule that "the decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the Law of Nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this." Sir William Scott, in the leading case of the *Maria*,[4] laid down as the true rule for the judgments of national prize-courts that it was the duty of the court "not to deliver occasional and shifting opinions to serve present purposes of national interest, but to administer with indifference that justice which the Law of Nations holds out, without distinction, to independent states, some happening to be neutral, and some belligerent: the seat of judicial auhority is indeed locally here, in the belligerent country, according to the known law and practice of nations, but the law itself has no locality." Again, in the case of the *Recovery*,[5] it was said that "it is to be recollected that this is a Court of the Law of

[1] Such was, doubtless, the effect of the award of the Geneva Tribunal in 1872, interpreting the application of the principles prescribed for its decision.

[2] See below, p. 410.

[3] 9 Cranch, 191, 198 (1815). Scott, *Cases*, 680; Evans, 450.

[4] 1 C. Rob., 340 (1799). Scott, *Cases*, 1003; Evans, 535.

[5] 6 C. Rob., 341 (1807).

Nations, though sitting here under the authority of the king of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it is the administration of the Law of Nations simply."

Nevertheless, in spite of these high ideals of the duty of national prize-courts, one has only to compare the British law of prize with the claims of France and Holland at a given period to find that what is laid down by the British courts as international law is frequently the British interpretation of that law.[1] A similar bias, dictated by the emergency of the occasion, is to be observed in the decisions of the American courts in cases arising out of captures for carriage of contraband and breach of blockade during the Civil War.[2] On the other hand, the decisions of national courts are facts, positive in character and forming a definite starting-point from which rules of law may develop, and have in the past developed. Their influence has in many cases been decisive in determining the policy of the home government, overruling all but the affirmative commands of the national legislature.[3] Moreover, where founded upon what are believed by the national court to be general principles of justice as well as concrete rules of international law, these decisions have frequently been persuasive with foreign courts as evidence of the rule which it has not been possible to discover from general practice. This reciprocal influence of foreign judgments has undoubtedly tended to strengthen the general sense of a higher law pervading the international community as a whole. To the extent to which international law becomes ultimately a part of the law of each separate state,[4] on a par with, if not taking precedence of, legislative enactments, it would appear that the decisions of national courts may be expected to exercise an important influence upon the development of international law. Especially is this likely if in time states should agree to permit an appeal from national courts to an international court of justice.[5]

[1] "It has been found, however," says Hyde, "that even when not restrained by the tenor of local statutory or other regulations, the natural prejudices of the most enlightened and scrupulous tribunal established under belligerent authority tend to weaken its impartiality and to diminish foreign respect for its conclusions." *International Law*, I, § 3. Hershey calls attention to the fact that this limited application of judicial decisions constitutes "one of the gravest objections to the teaching of International Law by the main or exclusive use of the 'case system.'" *Essentials of International Public Law*, p. 22.

[2] See below, pp. 540, 545. [3] See below, p. 507. [4] See below, p. 77.

[5] See, in general, the address before the American Institute of International Law by James Brown Scott, to whom the writer is indebted for numerous

Factors influencing the development of international law

Both the sources and the evidences of international law have frequently been confused with the various factors that have from time to time influenced the development of international law. Among these are to be included as of first importance the writings of scholars and publicists, whose part played as indirect sources and as evidences of the law has already been shown. It is, indeed, difficult to distinguish the use made of such writings as authoritative statements of the existing law and their use as persuasive exponents of a better rule than the existing one. In like manner the decisions of international arbitration courts, even when not regarded as precedents, have, as in the case of the award of the Geneva Arbitration Tribunal, had great weight in determining the future direction of the law. Similar, though much wider, influence has been exerted by the decisions of national courts, even after allowance has been made for their bias in their interpretations of the customary law. In a few instances the statutes of national legislatures and the proclamations of national executive heads have, by their enunciation of more progressive rules than those in force at the time, had the effect of winning general consent for their isolated position. Notable instances are the United States Neutrality Act of 1793 and the Instructions, known as Lieber's Code, issued by President Lincoln in 1863 for the government of the Federal armies.

Further, there is the growing influence exerted by international congresses of an unofficial character, and by international associations and societies, which in occasional or in annual conferences have devoted themselves to the elucidation of the rules of the past and the formulation of more constructive rules for the future. Among such congresses and associations may be mentioned the Institute of International Law, founded in 1873, the International Law Association, founded in 1873,[1] the Interparliamentary Union, organized in 1889; and, in the United States, the American Society of International Law, founded in 1905, and the more recent American Institute of International Law, founded in 1915.

suggestions personally made. It may be noted that Article 38 of the Statute of the Permanent Court of International Justice provides that in rendering its decisions the court shall apply in order (1) international conventions, (2) international custom, (3) the general principles of law, (4) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[1] Originally under the title of the Association for the Reform and Codification of the Law of Nations.

CHAP. IV

c. Codification of international law

In view of the uncertain character of customary law and of the lack of precision in its rules, attempts have been made from time to time to reduce the rules of international law to a systematic code. The term "code" has been used historically to cover a wide variety of rearrangements and restatements of the rules of law. In the case of international law codification has taken three more or less distinct forms: (1) an attempt to state in systematic form the rules actually in force between states; (2) the compilation of the rules in force, modified by such amendments as are regarded as necessary to bring the existing law into closer touch with the needs of the times and the standards of just and humane conduct; and (3) the complete reconstruction of the whole system of existing law based upon new principles and conforming to ideal standards of conduct rather than to the practical possibilities of the international situation. A further distinction may be made between codes formulated by the representatives of governments and subsequently adopted as statutory law, and codes formulated by private persons or associations or by individual governments, and possessing no authority apart from the inherent value of their recommendations.

Codification of rules in force

The first method of codification is represented in substance by most of the more recent treatises and texts on international law; but, owing to lack of form and arrangement, these texts have not usually been designated as codes. Rule, historical background, and argument are generally combined in such works. As has been shown above, these treatises and texts seek to present international law as a positive system with little criticism of its rules and few or no proposals for the constructive reform of the law.[1] The texts of Oppenheim and Westlake in Great Britain, of Davis, Wilson, and Hershey in the United States, of Bonfils and Despagnet in France, of von Liszt and von Ullmann in Germany and Austria, and of de Louter in Holland are typical presentations of the existing law scientifically arranged. An exceptional treatise on positive law, which follows the traditions of codification both in content and in form, is the code drawn up, in 862 articles, by the Swiss-German scholar, Bluntschli in 1868,[2] who announced that it was his intention "to formulate clearly the existing ideas of the civilized world."[3]

[1] See above, pp. 56-57.

[2] *Das Moderne Völkerrecht der Civilisirten Staaten als Rechtsbuch Dargestellt.*

[3] Introduction, § 2.

Formulation of new rules

It is the second and third methods of codification which have almost exclusively appropriated the name of "code." Codification of an official character, undertaken by the collective action of nations, was first attempted at Geneva in 1864, where a conference of the representatives of twelve nations sought to bring together the best existing practice on the subject of measures for the relief of the wounded on the field of battle and the immunities of non-combatants engaged in caring for them.[1] Later amendments to the Geneva Convention were adopted in 1868 but failed of ratification. In 1874 the representatives of the leading powers met at Brussels, at the invitation of the czar of Russia, to undertake a draft code of the law of war on land. The code drawn up, consisting of some sixty articles and known as the Declaration of Brussels,[2] failed, however, of subsequent ratification.

Codification by general conventions: the Hague conferences

More successful codification was accomplished in the conventions adopted by the Hague Peace Conference of 1899.[3] The laws and customs of war on land were codified on the basis of the unratified Declaration of Brussels of 1874; and the principles of the Geneva Convention of 1906 were adapted to maritime war. The conference also formulated a convention for the pacific settlement of international disputes, but this agreement was more in the nature of new statutory legislation than of codification of existing rules and practices. The same is true of the three declarations prohibiting the discharge of projectiles from balloons and the use of asphyxiating gases and of bullets with a hard envelope. The Hague Conference of 1907 adopted conventions codifying the rights and duties of neutral powers and persons in war on land and in maritime war, as well as six other conventions relative to the conduct of hostilities and the mutual relations of the belligerents.[4] The codes adopted in 1899 were amended in the light of experience, and a new statutory rule was adopted restricting the use of force for the recovery of contract debts. The London Naval Conference undertook the more difficult task of the codification of the "generally recognized principles of international law" in respect to maritime war.[5]

[1] For the text of the convention, see Higgins, *The Hague Peace Conferences*, 8.

[2] For the text of the declaration, see *ibid.*, 273.

[3] For the text of the conventions, see Scott, *Hague Conventions and Declarations*, 41, 100, 163, 220 ff.

[4] For the texts, see *Ibid.*, 41 ff.

[5] For the text, see Higgins, *op. cit.*, 540; Charles, *Treaties*, 266.

CHAP. IV

Conventions relating to general interests

In addition to the conventions regulating mutual rights and duties adopted at the Hague, there is the large body of conventions or treaties concluded during the past half-century dealing with matters of common interest and mutual concern to all states.[1] These conventions, although adopted individually and relating each to its particular object, constitute as a whole a code of international law with respect to the specific fields of activity defined by them. Since 1920 they have come to include not merely matters of common convenience about which there could be little conflict of policy, but matters, such as freedom of transit by land and waterways, which have hitherto lain in the disputed areas of international law. Their rapid growth, due partly to the machinery created by the League of Nations, gives promise not merely of more comprehensive regulations for the general welfare, but of the gradual delimitation of the sphere of disputed rules.[2]

Unofficial codification

Unofficial codification, undertaken by private individuals or associations or by single governments, has in many instances played an important part in influencing the later action of international conferences. The older texts on international law, such as those of Grotius and Vattel, belong by reason of both their content and their influence to this group of codes;[3] but, lacking the formal arrangement of codes, they have not been classified as such. Codification by single governments is illustrated by the draft code of the laws of war on land prepared by Francis Lieber and published by President Lincoln in 1863 under the title, "Instructions for the government of armies of the United States in the field."[4] This code proved its usefulness in actual warfare, and was freely drawn upon by the committee of codification of the Brussels Conference of 1874. Codification by scientific associations can be seen in several draft codes presented by the Institute of International Law, notably the *Manual of the Laws of War on Land* published in France in 1880. The "Declaration of the Rights and Duties of Nations" drawn up by the American Institute of International Law at its meeting at Washington in 1915-16,[5] represents an attempt at codification within a restricted field. Codification by private individuals is to be seen in the *Draft Outlines of an*

[1] See above, p. 65.

[2] See M. O. Hudson, "Codification of International Law through the League of Nations," *Proceedings*, Am. Branch Int. Law Assoc., 1923.

[3] See above, pp. 51-55.

[4] For the text of the instructions, see Wilson, *International Law*, 8th ed., Appendix I.

[5] For the text of the declaration, see *Am. Journal*, X (1916), 124.

International Code published by David Dudley Field in 1872 in the form of an international statute of 1008 articles, supplemented with notes explaining and justifying the rules laid down.[1] Of a similar character is the code published by the Italian jurist, Pasquale Fiore, under the title, *Il Diritto Internazionale Codificato e la Sua Sanzione Giuridica*.[2] The code embraces 1985 articles covering the whole field of international law.[3]

[1] The code was the contribution of the author to the work of a committee of the British Association for the Promotion of Social Science, which had been appointed to draw up a complete code of international law. In the preface to the first edition the author states that "the scheme embraced not only a codification of existing rules of international law, but the suggestion of such modifications and improvements as the more matured civilization of the present age should seem to require."

[2] Fifth edition, 1915. Translated into English by E. M. Borchard, 1918.

[3] The author describes his purpose as being "to set forth international law, taking into account the existing law and such rules as may be capable of becoming law." Borchard's translation, 78.

A summary of and commentary upon the literature of the codification of international law may be found in E. Nys, "The Codification of International Law," *Am. Journal*, V (1911), 871.

CHAPTER V

THE RELATION OF INTERNATIONAL LAW TO MUNICIPAL LAW

Different spheres in which international law and municipal law operate

International law is a law between states. It lays down the rights possessed by states and prescribes the mutual obligations or duties corresponding to those rights. As has been pointed out above, the basis of international law is contractual. The rules of which it consists rest upon the free consent of independent states, either as expressed impliedly in customs or explicitly in treaties. On the other hand, each of these states possesses its own municipal law, emanating from the sovereign authority of the state, and prescribing rules for the organization and functions of the government of the state and for the conduct of its citizens in their relations one to another and in their relations to the state as a whole. In respect to the relation between international law and municipal law, the question arises whether the former is to be regarded as a law binding only upon the state as such or as a law imposing duties directly upon the individual citizen. Has international law been incorporated into the law of the individual state? If so, which rule takes precedence in case of a conflict between a rule of international law and a rule prescribed by the constitution or by the legislature of the state?[1]

Implied adoption of international law by municipal law

In the absence of any organized power representing the collective will of the members of the international community and capable of executing that will by its own agents, the obligations which international law imposes can be enforced within the boundaries of the individual state only in so far as the individual state itself undertakes to see to their enforcement. It is, however, one of the implied conditions of membership in the community of nations that the individual state not only shall enjoy the rights belonging to it as such, but shall be faithful to the corresponding obligations incumbent upon it.[2] International law is, therefore,

[1] For a discussion of the general connection between the two branches of law, see Q. Wright, "International Law in Its Relation to Constitutional Law," *Am. Journal*, XVII (1923), 234.

[2] The rule was forcibly expressed by Secretary Webster in a letter to the United States minister to Mexico, April 15, 1842: "Every nation, on being

binding *per se* upon all the agencies of government within the state, and no act of the national legislature or decree of the executive or judicial agencies can change the force of its provisions in so far as the legal relations of the state toward other states are concerned. In the absence of a supernational authority the obligations of international law may be flouted by a particular state, and the agents of government may be justified in their conduct by the national law, but the international obligation persists none the less. Since, however, the constitution and laws of the individual state constitute the primary legal obligation of the agents of government and of the citizen body, it follows that the state is under obligation at international law to adjust its municipal law so as to give effect to such rules of international law as call for positive action, and to prevent conflicts between the provisions of its own law and those of international law.[1]

Methods of enforcing international law

In fulfilment of this obligation the several states have each followed its own method without reference to any uniform plan of giving effect to international law. In general, the nature of the rule of international law has determined the method taken by the individual state to put it into operation. Where the rule of international law exists in the form of a general principle, to be applied as the circumstances of the case seem to warrant, as in the instance of the recognition of new states, the executive officers of the state are allowed to act at discretion both in asserting the rights of the state and in upholding its obligations. Where the rule of international law lays a definite duty upon the state, municipal law generally steps in either to prescribe the appropriate action to be taken by its officers, as in the case of the immunities shown to diplomatic agents, or to prohibit its individual citizens from act-

received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war.'' See also Alexander Hamilton's *Letters of Camillus*, No. 20, in which the binding force of international law upon the United States is demonstrated from principle and from fact. Moore, *Digest*, I, 10.

[1] It should be observed that in the number of cases in which the courts of the United States have applied the provisions of acts of Congress in derogation of either general international law or specific treaty obligations, they have not been unmindful of the wrongful conduct of the legislative branch of the government; they have merely recognized that it is not their function to afford redress for the breach of international law. That must be effected through diplomatic channels. See Whitney *v.* Robertson, 124 U. S. 190 (1888), citing Taylor *v.* Morton, 2 Curtis 454 (1855). Scott, *Cases*, 458.

CHAP. V

ing in such a way as to compromise the international obligations of the state, as in the case of the offenses enumerated under neutrality laws.[1] In the absence of municipal law prescribing or prohibiting certain acts, practice varies in respect to the authority of the courts of the state to apply the principles and rules of international law in the adjudication of cases presented to them involving those principles and rules.

Practice of Great Britain

In Great Britain, owing doubtless to the authority of the common law as a rule of precedent, international law was early incorporated into the body of municipal law. Blackstone asserted in 1765 that the law of nations "is here adopted in its full extent by the common law, and is held to be a part of the law of the land."[2] In the case of Triquet *v.* Bath,[3] decided in 1764, in which the privileges of foreign ministers and their domestic servants were at issue, Lord Mansfield quoted from an earlier case (Buvot *v.* Barbuit) the opinion of Lord Talbot to the effect "that the law of nations, in its full extent, was part of the law of England," and that an act of Parliament (7 Ann., c. 12) merely provided summary jurisdiction where ordinary jurisdiction would otherwise have been exercised. This attitude of the courts, confirmed in later decisions, was apparently reversed in the case of Queen *v.* Keyn,[4] in which the court held, by a bare majority, that, in the absence of an act of Parliament extending the jurisdiction of the court over crimes committed in the maritime belt, the court could not sustain the conviction for manslaughter of a captain whose ship had come into collision with a British ship. The issue in this case, however, was municipal rather than international.[5]

The authority of international law before the courts was reëstablished in 1905 in the case of West Rand Central Gold Mining Company *v.* Rex,[6] in which the court, while refusing to inquire into the "act of state" by which the property of the Transvaal Government, including property confiscated from the West Rand Company, had been annexed by the British Government, neverthe-

[1] See, in general, Wright, *The Enforcement of International Law through Municipal Law in the United States.*

[2] *Commentaries on the Laws of England,* Book IV, Chap. 5.

[3] 3 Burr, 1478 (1764). Scott, *Cases,* 2.

[4] L. R. 2 Ex. Div., 63 (1876). Scott, *Cases,* 243.

[5] For comment, see Picciotto, *The Relation of Int. Law to the Law of England,* 86 ff. The decision was followed by the passage in 1878 of the Territorial Waters Jurisdiction Act, conferring jurisdiction upon the courts for the future. See below, p. 252.

[6] L. R. 2 K. B., 391 (1905). Scott, *Cases,* 5; Evans, 28, 98.

less assented to the principle that the rules of international law, when demonstrated to be such, "will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant." [1]

Practice of the United States

In the United States the adjustment of municipal law to meet the obligations of international law has been carried out to an exceptional degree. In the first place, the courts have undertaken, even in the absence of special legislation conferring jurisdiction upon them, to apply the rules of international law in proper cases presented to them. In the case of the *Nereide* [2] Chief Justice Marshall declared that the court, until an act of Congress should be passed, was "bound by the law of nations, which is a part of the law of the land"; and in an earlier case, Murray *v.* The Charming Betsy,[3] the chief justice went so far as to say that the interpretation of an act of Congress should never be such as to violate the law of nations if any other possible construction remained. An even more explicit affirmation of the implied adoption of international law is contained in the more recent case of the *Paquete Habana*,[4] decided in 1899, in which the court declared that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." After a review of the precedents and authorities on the subject the court found evidence, independently of any express treaty or act of municipal law, of the existence of a customary rule of international law "that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war."

In addition to this assumption of implied jurisdiction by the courts, there exists in the United States a large body of federal legislation directed explicitly to the enforcement of the obligations of international law. While leaving the executive department free

[1] In meeting the point made by Lord Robert Cecil that international law formed part of the law of England, the court held that there must be evidence to show that the particular proposition had been recognized and acted upon by England or else that "it is of such a nature and has been so widely and generally accepted that it can hardly be supposed that any civilized state would repudiate it."

[2] 9 Cranch, 388 (1815); Scott, *Cases*, 499; Evans, 544.

[3] 2 Cranch, 64 (1804).

[4] 175 U. S., 677 (1899). Scott, *Cases*, 12; Evans, 602.

to exercise discretion in the determination of what are known as "political questions," Congress has undertaken in other cases to guide the hands of the President and the administrative departments. Moreover, acting in pursuance of authority expressly conferred by the Constitution,[1] Congress has enacted penal laws prohibiting citizens and others from committing within the territory of the United States acts for which the nation would be held responsible as a violation of an international duty. The most important of these statutes are, perhaps, the neutrality acts of 1794 and 1818 defining in detail the acts which, if done by individuals upon the soil of the country, would in the judgment of the United States compromise its position as a neutral state.[2]

[1] Article I, Sec. 8: [The Congress shall have the power] "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."

[2] See below, p. 561.

PART II

THE PERSONS OF INTERNATIONAL LAW

CHAPTER VI

MEMBERSHIP IN THE COMMUNITY OF NATIONS

a. The "family of nations"

The persons of international law, or the subjects in whom inhere the rights and obligations defined by the law, are the states or nations[1] recognized as belonging to the international community. Formal membership in the family of nations appears to be an essential condition of the enjoyment by a state of legal rights and duties. While as a point of theory it is claimed by some writers that a new state, formed from among the existing civilized states, enters as of right into the family of nations,[2] as a practical matter states may be in existence without being admitted to official intercourse with the members of the family of nations, so that pending such admission they have no standing before the law.

When, in the seventeenth century, the rules of international law began to take definite shape the membership of the family of nations was limited to the small group of Christian European states which had been maintaining intercourse with one another for several centuries. These states formed, as it were, the charter members of the international community, although this phrase suggests a more conscious sense of association than actually existed. Gradually they widened their narrow circle by admitting into it not only new European states, but the American states of European culture which had grown out of the colonial settlements of the older powers. In 1856, by the Treaty of Paris, the first non-Christian state, the Ottoman Empire, was admitted "to participate in the public law and concert of Europe." By the close of the century Japan was admitted, together with other non-Christian states such as Persia and China, whose membership, however, was qualified and restricted. At the present day there is practically no organized political community in the world that is not under the dominion of international law, whether in its own right or in that of another state.[3]

[1] No distinction is made in international law between the two terms, whatever variations of meaning are assigned by political science.

[2] As, for example, by Hall, *International Law*, § 2.

[3] It should be observed that while the loose organization of the "family of nations" or the "international community" was not regarded as having a

CHAP. VI

Corporate character of international persons

By contrast with the natural persons who form the subjects of municipal law, the persons of international law are corporate juristic bodies possessing a unity or moral personality by reason of certain bonds that hold their individual members together. Several problems peculiar to international law arise in consequence of this corporate juristic nature of states. In the first place, international law assumes as an attribute or mark of statehood that the corporate body must possess a collective will as a necessary condition of the exercise of legal rights and the fulfilment of legal obligations. As understood in international law, a state is a permanently organized political society, occupying a fixed territory and enjoying within the borders of that territory a freedom from control by any other state which enables it to be a responsible agent before the world. The element of permanent organization is demanded as an assurance that the collective will of the state can be relied upon by other states to endure sufficiently long to meet the obligations assumed. The element of fixed territory is demanded as a means of identifying the state and holding it to account for its actions. The territorial nature of statehood is, however, rather the result of historical circumstances growing out of the feudal system and out of the juristic conceptions of sovereignty prevailing at the time when modern international law began to take definite shape.[1] The element of freedom from external control is demanded by the nature of international law as a rule of conduct self-imposed by the members of the international community without the interposition of any supra-national authority. A state is not in fact independent in respect to the rules of international law; it must, however, be independent with respect to the legal control of any other state or states capable of dictating its conduct.

Distinction between the state and its individual citizens

In the second place the state, being composite in nature, cannot act as a physical unit. It becomes necessary, therefore, to draw a distinction between the corporate unit of the state and the individuals who compose it. On one hand there are the agents of the state, its public officers, who by prerogative or by democratic election represent the state in its dealings with other states. The

corporate personality of its own, the closer and constitutionally defined organization of the League of Nations appears to possess such a character. Oppenheim holds that although the League is not a super-state it nevertheless is an international person *sui generis*, existing side by side and in coöperation with sovereign states. *International Law*, 3rd ed. For examples of corporate action by the League, see below, pp. 88, 99.

[1] Hall, *ibid.*, § 1.

acts of these officers are attributed by law to the state, and the state is therefore held responsible for them. But the officers of states are not subjects of international law; they are merely representatives of the corporate personality of their respective states, upon which alone the law is directly binding. On the other hand there are the citizens of the state and other persons temporarily subject to its jurisdiction whose conduct is under certain circumstances imputed to the state, so that a body of rules has been developed which appears to prescribe their rights and duties. These rules, such as the law of contraband and blockade in time of war, do not, however, bear directly upon such individuals, but only indirectly through the protection accorded to them by the states of which they are citizens. Individuals under such circumstances are not *subjects* but *objects* of international law. Their apparent international rights are in reality municipal rights, since international law knows only the state of which they are citizens and will protect their rights only through the interposition of their state.[1] A number of authors hold that individuals as such are subjects of international law, that there are natural rights possessed by man as against other nations as well as against his own nation.[2] This position, however, while justified as an inference from the practice of national courts in dealing with cases affecting aliens when questions of international law are involved, can not be reconciled with the present formal legal basis of international relations.

Divergences of corporate character

In the third place the corporate character of state personality has, in the course of historical development, become possessed by a group of political communities differing widely from one another in the number of their citizens, in the extent of their territory, and in the degree of their political and cultural progress. It has been found possible to reconcile extremes of population and extent of territory, and membership in the international community has not been affected by such marked divergences as between the population of Switzerland and that of Great Britain or between the area of Belgium and that of Brazil. On the other hand, differences of political and cultural progress have been more difficult of adjustment, and in consequence the community of nations is found to be composed of states which enjoy full membership and of other states which enjoy but partial membership. Of those which enjoy full

[1] See Oppenheim, *International Law*, I, § 13.

[2] The Italian jurist Fiore is conspicuous among the proponents of this view. *Diritto Internazionale Codificato* (Borchard's trans.), XXIII.

CHAP. VI

membership some few are subject to restrictions which, while qualifying the enjoyment of their rights, do not limit their status of full membership. Of those which enjoy partial membership all are under a greater or less degree of wardship in respect to other states, although in some instances the bond is so slight that they might be regarded as independent semi-civilized states.

b. Full membership in the international community

States enjoying full membership in the international community are known in international law as "sovereign states." After centuries of use, the meaning of the term "sovereignty" is still lacking in scientific precision, and its application is attended with many inconsistencies.[1] In technical usage a sovereign state is one which exercises supreme authority over all persons and property within its borders and is completely independent of control from without. Sovereignty does not, however, exclude numerous restrictions upon freedom of conduct which arise as a direct consequence of the binding character of the rules of international law. These restrictions, in so far as they represent international custom and tradition, are regarded as having been impliedly accepted by the sovereign state, while any new restrictions coming into effect from time to time must be formally accepted to be regarded as binding. By looking upon the restrictions of international law as self-imposed and voluntarily maintained, international law has reconciled the fiction of "sovereignty" with the actual interdependence of nations.[2]

Marks of full membership

Attached to sovereignty are a number of concrete immunities and privileges which may be regarded as the marks of full membership in the family of nations. Sovereign states are by international custom entitled to the privilege of sending diplomatic ministers to other states and of receiving representatives from them in return. They conclude in their own name treaties one with another looking to the advancement of their mutual interests; they enjoy immunity from being sued in the courts of other states; and they meet at international conferences on a basis of formal equality. Whatever rights are conferred by international law they enjoy to the fullest degree without the intermediation of any third party; whatever duties are imposed by international law are borne by them in their own person.

[1] See Oppenheim, *Int. Law*, I, §§ 63-70.

[2] For an exceptional instance of coercion which nevertheless does not militate against the principle of sovereignty, see below, pp. 301-302.

Qualified full membership

A small number of states enjoy the privileges attending full membership in the international community, yet are subject to certain restrictions upon their freedom of conduct not voluntarily assumed by them. These states are ordinarily classified as "sovereign states" partly because of the loose connotation of that term, and partly because of the fact that the restrictions imposed upon them are not such as to impede in any substantial way their freedom of action.[1] The term "qualified full membership" is merely descriptive; international law has no special technical term to describe such states.[2]

Neutralized states

The most important of these states having qualified membership is a small group of neutralized states, upon which the status of permanent neutrality in all future wars has been formally imposed by a group of the Great Powers. The act of neutralization has generally taken the form of a treaty between the parties, and has as a rule been accompanied by a guarantee of the independence and territorial integrity of the neutralized state. In consequence, while the neutral state has agreed on its part both to forego undertaking war, except in self-defense, and to refrain from entering into any agreements which might require its participation in a future war or deprive it of its territory, the Great Powers on their part have agreed to respect the fixed status of the neutral state; so that neutralization treaties have to that extent represented reciprocal obligations.

Obligations of the guarantors

The obligations assumed by the guarantors of a treaty of neutralization are not clearly defined by international law owing to the indefinite character of the pledges given and to the variations in the form of the guarantees. The neutralization of Switzerland was accomplished by Article LXXXIV of the final act of the Congress of Vienna, June 9, 1815, which, in the form of an earlier declaration of March 20, 1815, had been accepted by the Swiss Diet in a note of May 27, 1815. Article LXXXIV of the Treaty of Vienna was confirmed by a declaration made at Paris, November 20, 1815, in which "the powers which signed the declaration of Vienna of March 20 recognize in a formal and authentic manner by these presents the perpetual neutrality of Switzerland, and

[1] See below, pp. 90 ff.

[2] The terms "vassal states," "protectorates," "dependencies," which have been generally used to describe these states, are unsatisfactory as a basis of classification, having been used to cover states of varying degrees of membership in the family of nations.

CHAP. VI

guarantee to it the inviolability of its territory within its new limits."[1] The neutralization of Belgium, first effected in 1831, was confirmed by the Treaty of London of April 19, 1839,[2] in which the signatory powers, severally enumerated, placed under their guarantee the annexed twenty-four articles, Article VII of which provided that Belgium "shall form an independent and perpetually neutral state," and that "it shall be bound to observe such neutrality toward all other states."[3]

The collective guarantee

In each of these cases the guarantee was apparently given by the signatory powers both jointly and severally. On the other hand the neutralization of Luxemburg was accomplished by the Treaty of London in 1867 in which "the high contracting parties engage to respect the principle of neutrality stipulated by the present article. That principle is and remains placed under the sanction of the collective guarantee of the powers signing the present treaty, with the exception of Belgium, which is itself a neutral state."[4] The neutralization of the Ionian Islands by the treaties of 1863 and 1864 contained a similar engagement on the part of the five contracting powers "to respect the principle of neutrality stipulated by the present article."[5] In 1885 the signatory powers of the Congo Conference at Berlin pledged themselves to respect the neutrality of the territories of the Congo basin;[6] but when the Congo Free State was merged into Belgium in 1908 it became a question whether the provisions of the treaty of 1885 continued in force. A more recent instance of neutralization is that effected by the treaty of 1922 by which the Baltic powers, together with France, established a neutral zone around the Aaland Islands within which no military or naval establishments were to be erected and no acts of hostility committed in time of war.[7] On its part Finland, to whom the sovereignty of the islands had been awarded by decision of the League of Nations,

[1] For the text of the final act and of the declaration, see Martens, *Nouv. Rec.*, II, 379, 740; Hertslet, *Map of Europe by Treaty*, I, 208, 370.

[2] Art. I.

[3] For the text of the treaty, see Martens, *op. cit.*, XVI, 790; Hertslet, *op cit.*, I, 996.

[4] For the text of the treaty, see Martens, *Nouv. Rec. Gen.*, XVIII, 448.

[5] For the text of the treaty of Nov. 14, 1863, see Hertslet, *op. cit.*, II, 1569; *Br. and For. State Papers*, LIII, 19. The neutrality of the islands has several times been violated, as in 1897 by Turkey, in 1916 by the Great Powers, and again, possibly, by Italy in 1923 when Corfu was seized as security for the payment of the indemnity demanded of Greece.

[6] Arts. X, XI. *Br. and For. State Papers*, LXVI, 4.

[7] For the text of the treaty, see *Am. Journal*, XVII (1923), Supp. I. See also C. N. Gregory, "The Neutralization of the Aaland Islands," *ibid.*, XVII,

confirmed the declaration made by Russia in 1856 undertaking not to fortify the islands.

Implied conditions of the guarantee

The question arose at the time of the Franco-Prussian War, and more acutely at the outbreak of the World War, whether the terms of the treaty of neutralization obligated a particular guarantor to act alone should the other guarantors as a body refuse to coöperate for the vindication of the guarantee, or themselves be parties to its violation. In the case of Luxemburg, it was argued in 1870 that a mere "collective" guarantee involved nothing more than a common agreement not to violate the neutrality of the particular state, with no attendant sanction,[1] and this view was again held in 1914. The treaty relating to Belgium, however, was regarded in 1870 as creating an obligation on the part of the guarantors to act both collectively and singly, and this obligation was in no way impaired by the fact that Great Britain proposed to both France and Prussia that a special agreement be entered into affirming the intention of the two belligerents to respect the provisions of the treaty of 1839.[2] The binding force of the treaty was recognized by Great Britain in the negotiations immediately preceding the declaration of war against Germany on August 4, 1914. The German Government on its part did not disown the obligations of the treaty, in spite of the reference of the chancellor to it as a "scrap of paper," but regarded the obligation impossible of observance in the presence of a "state of necessity," alleging the danger of a later violation by France.[3]

At the close of the war the king of Belgium declared that, in consequence of the defeat of the Central Powers, the restrictions imposed by the treaty were at an end.[4] The unilateral declaration of the Belgian king received formal confirmation in Article 31 of the Treaty of Versailles, by which Germany recognized that the treaties of 1839 "no longer conform to the requirements of the

63, where the dispute between Sweden and Finland as to the sovereignty of the islands is discussed.

[1] For opposing views, see Stowell, *Diplomacy of the War of 1914*, 606-624.

[2] See Stowell, *op. cit.*, 602, 615-626.

[3] *Ibid.*, Chap. IX, 371-456. See below, p. 145. The literature upon the subject is extensive. For a bibliography, see de Visscher, *Belgium's Case: A Juridical Inquiry*, where the treaties of 1831 and 1839 are discussed in detail.

[4] Speaking before the Belgian Parliament on November 22, 1918, King Albert said: "Belgium, victorious and freed from the neutrality that was imposed upon her by states which have been shaken to their foundations by the war, will enjoy complete independence. Belgium, re-established in all its rights, will rule its destinies according to its aspirations and in full sovereignty." *New York Times*, Nov. 23, 1918.

CHAP. VI

situation," and consented to their abrogation and to the immediate recognition and observance of whatever conventions might be entered into to replace them.

Distinction between neutralized and neutral states

It is important to observe the distinction between the permanent status of a neutralized state and the temporary status of a neutral state in time of war between other states. In the case of the former the status of neutrality is guaranteed by the explicit agreement of a limited number of powers, accompanied by a definite sanction and by a corresponding obligation on the part of the neutralized state to remain such. In the case of the latter there are no specific guarantees, but only the general rules of international law; there are no special sanctions, but only the usual sanctions of international law; and there is no obligation on the part of the neutral state to maintain its attitude of neutrality. The Convention Relating to the Rights and Duties of Neutral States in War on Land, adopted at the Hague Peace Conference of 1907, provided that "the territory of neutral powers is inviolable," and that "belligerents are forbidden to move troops or convoys, of either munitions of war or supplies across the territory of a neutral power."[1] Although this convention was signed and ratified by the United States, no obligation under international law was thereby assumed to intervene in 1914 to secure the observance of the two rules.[2]

States admitted into the family of nations under conditions

A second group of states having qualified full membership in the international community are the states which have been admitted into the family of nations under fixed conditions. These states have contracted at the time of their entrance into the international community that they will observe certain rules prescribed for them by certain of the older members of the community. Since the contract takes the form of a treaty, which by legal fiction is voluntarily entered into, and since the obligations imposed are not different from the normal conduct to be expected of a civilized state, no derogation from the full international personality of the state is implied. The Treaty of Berlin of 1878, in recognizing the independence of Montenegro, imposed special obligations upon that

[1] Art. 1, 2.

[2] "These articles [of the Hague convention], however, embody no more than the traditional law of neutrality, and in signing them the states merely intended to give formal recognition to a rule previously part of the customary law, without in any way binding themselves to take active measures to secure the observance of the convention. No greater legal obligations were assumed by the signatory powers than those they were previously subject to." Fenwick, *Wardship in International Law*, 14.

state in respect to religious and racial toleration, limitation of fortifications, sanitary police administration by Austria-Hungary along the coast, and freedom of transit across Montenegro for the subjects of other states. Similar restrictions were laid upon the new states of Serbia and Rumania, with a more explicit prohibition against the imposition of transit dues upon goods passing through the country.

Provisions of the treaties of 1919

The precedents established by the Treaty of Berlin were followed at the Peace Conference of 1919 in the creation of the new states of Poland, Czechoslovakia, and Jugoslavia. By the Treaty of Versailles Poland was obligated to conclude a separate treaty with the Principal Allied and Associated Powers containing provisions which they might deem necessary "to protect the interests of inhabitants of Poland who differ from the majority of the population in race, language, or religion."[1] The treaty contemplated was concluded June 28, 1919, and was placed under the guaranty of the League of Nations. Further, Poland agreed to embody in a similar treaty with the same powers "such provisions as they might deem necessary to protect freedom of transit and equitable treatment of the commerce of all nations." Similar agreements were entered into by Czechoslovakia, Jugoslavia, and Rumania by the Treaty of St.-Germain.[2] Supplementing these measures of the Peace Conference, the Assembly of the League of Nations adopted in 1920 a recommendation that "in the event of Albania, the Baltic and Caucasian states being admitted to the League," the latter should take the necessary measures to enforce the provisions of the minorities treaties.[3]

The emancipation of Bulgaria

Two instances, each unique of its kind, of the admission of new states to full membership in the family of nations, although qualified by conditions in apparent derogation of sovereignty, are furnished by Bulgaria and Cuba. During the period 1878-1908 Bulgaria passed through the stage of emancipation from the status of a "vassal state" to that of complete formal independence. Created in 1878 an autonomous and tributary principality under the suzerainty of the sultan and under the nominal guardianship

[1] Art. 93.

[2] Art. 51, 57, 60. More elaborate restrictions were placed upon Austria, Art. 62-69. Art. 49-57 of the Treaty of Neuilly-sur-Seine and Art. 54-60 of the Treaty of Trianon impose similar restrictions upon Bulgaria and Hungary.

[3] See *Handbook on the League of Nations*, 1920-1923, p. 308; H. Rosting, "Protection of Minorities by the League of Nations," *Am. Journal*, XVII (1923), 641; Temperley, *History of the Peace Conference of Paris*, Vol. V, Chap. II, "The Treaties for the Protection of Minorities."

CHAP. VI

first of Russia [1] and then of the Great Powers,[2] and subjected to restrictions similar to those imposed upon Serbia, Bulgaria asserted the right to declare war, to conclude peace, and to enter into treaties and maintain diplomatic relations with foreign nations. In 1899 delegates from Bulgaria were admitted to the Hague Peace Conference. The declaration of independence in 1908, by which Bulgaria formally severed the bond of vassalage, did no more than give a new legal character to a situation already definitely maintained.[3]

The emancipation of Cuba

The emancipation of Cuba as an independent state under the protection of the United States was without precedent in international law. On April 20, 1898, Congress adopted a joint resolution recognizing the independence of Cuba and demanding that the Spanish Government relinquish its authority over the island. By the Treaty of Paris Spain gave up its claim of sovereignty over Cuba, leaving the United States in military occupation. On March 2, 1901, an act of Congress authorized the President to leave the government and control of Cuba to its people upon their acceptance of certain conditions embodied in the "Platt Amendment." The conditions placed restrictions upon the financial and treaty-making powers of the new state, imposed minor administrative obligations, and provided for a right of intervention on the part of the United States for "the maintenance of a government adequate for the protection of life, property and individual liberty." These conditions were accepted by Cuba and incorporated into a treaty between the two countries under date of May 22, 1903.[4] Since the procedure was observed of a voluntary contractual acceptance on the part of Cuba of the conditions imposed, international law sees in the conditions merely a renunciation by Cuba of the exercise of certain powers, not an infringement of the legal sovereignty of the new state, or of its equal standing in the family of nations.[5]

Anomalous position of Panama, Haiti, and Santo Domingo

The status of Panama, Haiti, and Santo Domingo, like that of Cuba, is abnormal. By treaty agreements these three states have vested in the United States the exercise of certain powers or attributes of sovereignty, retaining, however, their legal sover-

[1] By the Treaty of San Stefano, March 3, 1878.
[2] By the Treaty of Berlin, July 13, 1878.
[3] See Fenwick, *op. cit.*, 22-24.
[4] For the text of the treaty, see Malloy, *Treaties*, I, 362. The Platt Amendment is embodied in the text of the treaty.
[5] See above, p. 90.

eignty and full membership in the family of nations.[1] By a treaty entered into in 1903,[2] the United States guaranteed the independence of Panama and at the same time obtained the lease of the Canal Zone, which carried with it the exclusive control incident to sovereignty. A right of intervention on the part of the United States was also provided for to enforce compliance with sanitary measures to be taken in the cities of Panama and Colon, not included in the grant, and to maintain order in them, if necessary. By the treaty of February 8, 1907,[3] the Dominican Republic agreed to receive assistance from the United States with the object of enabling it to pay off its public debt. Provision was made for the appointment by the United States of a receiver-general of Dominican customs, and restrictions were placed upon the right of the Dominican Government to increase the public debt. Limited control of domestic administration was provided for in the right given to the United States to protect the receiver-general in the performance of his duties. The treaty of September 16, 1915, between the United States and Haiti follows the general lines of the treaty with the Dominican Republic, with further restrictions similar to those in the Cuban treaty.[4]

c. Partial membership

In addition to states having full membership in the family of nations and others having qualified full membership, international law recognizes a number of states which are only in part members of the international community. These states possess a minimum of legal rights in their own name, and thus enjoy a limited degree of international personality; yet they do not rank as sovereign states, and they share only in part in the substantive and procedural rights of sovereign states. Their status is anomalous and not clearly defined by international law, being the result of historical circumstances over which international law has exercised no jurisdiction. The name traditionally applied to these states has been that of "semi-sovereign states." But this designation has come into disfavor on account of its inherent inconsistency and the uncertainty of its application. The term "dependent states" expresses their status both in law and in fact. Speaking generally, states coming under this head have practically complete

[1] This situation requires that a distinction be drawn between a grant of sovereign powers and a grant of sovereignty. By renouncing the exercise of certain sovereign powers the small state becomes to that extent dependent in fact upon the large state, but remains in law independent.

[2] For the text of the treaty, see Malloy, *Treaties*, II, 1349.

[3] For the text, see *ibid.*, I, 418.

[4] See *Am. Journal*, X (1916), 859. For the text, *ibid.*, Supp. 234.

CHAP. VI

control over the administration of their domestic affairs; i.e., they have "internal independence," while they are subject to a greater or less degree of dependence upon another state or union of states in respect to control over their relations with other states.

Members of a confederation

Modern history has witnessed a wide variety of confederations, so that it is difficult to determine accurately the partial degree of international personality possessed by the member states.[1] The distinguishing characteristic of the confederation is that the union created between the component members does not subject them in point of law to a higher political authority, but merely associates them for certain specified purposes, leaving them in other respects "sovereign and independent" states. While there is mutual interdependence, there is no dependence of the individual state upon the group as a composite whole. The degree of international personality possessed by the member states depends upon the facts of each case. Under the Articles of Confederation of 1781-89 the states of the United States, in spite of the explicit retention by each state of its "sovereignty and independence,"[2] lost their international personality. For all practical purposes, such international personality as they continued to have, if any, was latent in their right to reassert their control over their foreign affairs by dissolving the union. The German Confederation of 1815-66 left to the individual states the right to enter into treaties not in conflict with the treaties of the Confederation, to maintain diplomatic representation with other states, and to enter into alliances not prejudicial to the Confederation; and to that extent they enjoyed a degree of international personality.[3] It is disputed whether the confederation as a unit acquires international personality while the separate personalities of its individual members are in abeyance. In the case of the United States it did so both in law and in fact; and in other cases it appears to have done so in fact if doubtfully so in law.

[1] For example, Vattel, writing in 1758, insisted that confederations, such as the United Provinces of the Netherlands and the Swiss Confederation, did not "impair the sovereignty of the individual members," owing to the voluntary character of the union. (Book I, § 10.) As a matter of fact, however, international law recognized the governmental organs of the confederacy as speaking for the component members.

[2] Art. II: "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled."

[3] The internal organization of the Swiss Confederation from 1815 to 1848 resembled that of the German Confederation. See Treaty of Vienna, June 9, 1815, Art. 53-64; 74-84. Hertslet, *op. cit.*, I, 208.

"Real unions"

A special form of confederation is the "real union," which exists when two or more severally sovereign states have the same monarch and for international purposes act as one state. The potential international personality retained by the individual states in such unions is to be seen in the peaceful dissolution of Norway and Sweden by the Treaty of Karlstad in 1905. By the act of separation Norway automatically became a member of the family of nations without the necessity of the usual formality of recognition.[1] The last example of a real union was that of Austria-Hungary, which was dissolved under stress of defeat in war in 1918.[2]

Members of a federal state

Closer than the union of states in a confederation is the union between the members of a federal state. Here the federal state appears as a composite person, responsible at international law for the conduct of the members of the union and competent to speak in their collective name. On occasion the anomaly is presented of a federal state whose members continue to maintain certain external relations with other states, as in the case of the member states of the German Empire under the Constitution of 1872.[3] On the other hand the members may surrender entirely their individual international personality to the new composite person. Such was the effect of the adoption of the Constitution of the United States, under which the identity of the members continued only as a matter of constitutional law. The states retained their separate and independent autonomy in respect to the sphere of self-government reserved to them under the Constitution; they delegated to the Federal Government full control of their external affairs.[4]

Vassal states

Vassal states, or states under suzerainty, are states which, while

[1] The Treaty of Christiania, November 2, 1907, by which the Great Powers guaranteed the integrity of Norway, cannot be regarded as an act of "recognition." For the text, see *Br. and For. State Papers*, C, 536.

[2] To be distinguished from the "real union" is the "personal union," such as that between Great Britain and Hanover from 1714 to 1837, by which two states in other respects sovereign and independent are for the time united under the same ruler. Since sovereignty is no longer identified with the ultimate ownership of the territory, such unions are a purely constitutional matter and do not affect the distinct identity of the two states as persons of international law.

[3] Oppenheim holds that they enjoyed in consequence a degree of international personality. *Op. cit.*, I, § 89.

[4] In the leading case of State of Texas *v.* White, 7 Wallace, 700, Scott, *Cases*, 34, the court held that Texas continued to be a legal member of the Union in spite of its decrees of secession and its period of forcible resistance to the Government of the Union. "The Constitution," said the court, "looks to an indestructible Union, composed of indestructible States."

CHAP. VI

enjoying autonomy in the management of their domestic affairs, are in respect to their foreign affairs dependent to a greater or less degree upon their suzerain state, to which they pay a formal homage. The relationship of vassal and suzerain arose out of the feudal system of the Middle Ages, and obtained recognition in international law in consequence of the semi-sovereign position of the smaller German states with respect to the Holy Roman Empire in the years following 1648. The vassal state of modern times represents the emancipation of a subject province from the control of an alien government, the liberated territory passing through a transitional stage of domestic autonomy, subject to a greater or less degree of guardianship by the suzerain state, until complete severance of the bond of vassalage is attained. In the case of Bulgaria between 1878 and 1908 the bond of vassalage was so nominal as to make it possible for that state to claim a position of full, though qualified, membership in the family of nations.[1]

While subject to the bond of vassalage, the vassal state enjoys a partial membership in the international community, characterized not by its domestic autonomy,[2] but by the relations between the vassal state and the recognized members of the family of nations. From 1829 to 1878 Rumania—then consisting of the separate provinces of Moldavia and Wallachia—was a vassal state subject to the suzerainty of Turkey, under the guardianship, first of Russia, and then, after 1856, of the Great Powers.[3] Serbia's position during the same period closely approximated that of Rumania.[4] Crete obtained the status of vassal in 1878, when its previous autonomy was confirmed by the Treaty of Berlin.[5] Egypt's record is intricate. In 1840 it was recognized as a vassal of Turkey under the guardianship of the signatories of the London Convention. Subsequently its powers in foreign affairs were enlarged by Turkish firmans to the extent of enabling the khedive to contract loans and to enter into commercial treaties with foreign states.[6] By 1883 the earlier guardianship of the Great Powers had been left in the hands of Great Britain, whose control over the

[1] See above, p. 91.
[2] This, however, is the basis often referred to by authors.
[3] See Treaty of Adrianople, 1829, Art. V; Treaty of Paris, 1856, Art. XXII.
[4] See Treaty of Paris, 1856, Art. XXVIII-XXIX.
[5] See Treaty of Berlin, 1878, Art. XXIII.
[6] In 1873 the British High Court of Admiralty, in the case of the *Charkieh*, L. R. 4 Adm. & Ecc. 59; Scott, *Cases*, 29, held that the khedive, being neither a sovereign nor a semi-sovereign prince, could not claim for one of his public vessels exemption from the jurisdiction of the court.

country increased to such an extent that Egypt became a *de facto* British protectorate under the merely nominal suzerainty of the sultan.[1] In November, 1914, Great Britain proclaimed a formal protectorate over the country, and the khedive assumed the title of sultan as indicating the termination of the state of vassalage. On February 28, 1922, the independence of Egypt was formally acknowledged by Great Britain.[2] Further instances of the possession of partial international personality by vassal states are to be seen in the status of the Transvaal between 1881 and 1899, in that of Outer Mongolia since 1912, and in that of Tibet since 1914.[3]

Protectorates

The term "protectorate" has, like that of vassal state, been loosely used in international law and covers a wide variety of dependent states, some of which possess an unquestioned, if not definitely ascertainable, degree of international personality, while others possess none at all. In general the protectorate is a state which has by formal treaty placed itself under the protection of a stronger state, surrendering to the latter the control over its foreign relations, while retaining a large measure of control over its domestic government. It may be distinguished from the vassal state[4] in that the protectorate has generally enjoyed a degree of independence prior to the treaty, so that its status represents in theory a voluntary act of subordination to the protecting state by contrast with the concession of autonomy made by the suzerain state to the vassal state. A presumption of freedom, when not bound by the treaty, rests, therefore, with the protectorate; but in many instances the relationship is one of even greater dependence than that to which the vassal state is subjected. A distinction should be made between protectorates under the guardianship of a single state and protectorates under the guardianship of the Great Powers as a body.

The Ionian Islands

In 1815, by a treaty between Great Britain, Austria, Prussia, and Russia, the Ionian Islands, previously subject to Turkey, were

[1] Willoughby and Fenwick, *Types of Restricted Sovereignty*, 38.

[2] The creation of the new state was effected by means of a "Declaration to Egypt" in which Parliament announced that: "The British protectorate over Egypt is terminated and Egypt is declared to be a sovereign state." Qualifications were imposed in the form of an agreement on the part of Egypt to enter subsequently into a treaty providing for a judicial adviser as a substitute for the mixed tribunals, a financial adviser to superintend the administration of the public debt, regulations as to the use of water-power in the Sudan, and the disposal of British military forces.

[3] For details, see Willoughby and Fenwick, *Types of Restricted Sovereignty*, 59, 85.

[4] The line between the two is often difficult to draw.

CHAP. VI

made a "single, free, and independent state" under the protection of the British Crown. Conditions were imposed in the form of the razing of fortifications and the supervision of the internal organization of the islands by the guardian state.[1] The protectorate came to an end in 1863 when the islands were united to Greece, at which time they were made permanently neutral.[2]

Morocco

Morocco came under the guardianship of the Great Powers in 1906, when the general act of the Algeciras Conference recognized the independence and integrity of the country and undertook to provide for the reform of its domestic government and the regulation of its economic development.[3] Measures were taken to organize a Moroccan police and to suppress illicit trade in arms; the construction of public works was to be carried out on a basis of equality in respect to the participation of foreign powers; and provision was made for equal commercial facilities in Morocco for all nations. This international guardianship practically came to an end in 1911, when an agreement was entered into between France and Germany by which Germany renounced all political interests in Morocco and agreed to the establishment of a French protectorate.[4]

Albania

In 1912 an effort was made by the Great Powers to emancipate Albania from the control of Turkey.[5] The principle of Albanian autonomy was recognized, and an international commission was appointed to direct the organization of the new state. Prince William of Wied was selected as executive head, to be supported and advised by the commission of control. But internal disorder, followed by the outbreak of war between the guardians of Albania, made it necessary for both the prince and the commission to leave the country. In 1917 a provisional government was set up, and

[1] Hertslet, *Map of Europe*, I, 337; Martens, *Nouv. Rec.*, II, 663. In illustration of the distinct international personality of the islands under the protectorate, it was held in the case of the *Leucade*, 2 Spinks, 212 (1855), Scott, *Cases*, 21, that the fact that the protecting power was at war did not involve the islands in war in the absence of a clear intention on the part of Great Britain to declare war on their behalf.

[2] See above, p. 88.

[3] *Am. Journal*, I (1907), Supp. 47.

[4] *Ibid.*, VI (1912), 159, 699; Supp. 62, 113. The recognition of the French protectorate was confirmed by Art. 142 of the Treaty of Versailles.

The status of Morocco under the French protectorate, as well as that of Tunis under the protectorate established in 1883, received incidental treatment in the decision of the Permanent Court of International Justice in connection with the French Nationality Decrees of November, 1921. See below, p. 167, n. 2.

[5] The control of the Great Powers was confirmed by the Treaty of London of May 30, 1913. *Am. Journal*, VIII (1914), Supp. 12.

this body acquired a *de jure* character when on December 17, 1920, by vote of the Assembly Albania was admitted as a member of the League of Nations.

Abyssinia

In 1906 Great Britain, France, and Italy agreed among themselves to respect and protect the integrity of Abyssinia, while at the same time taking steps to adjust in an equitable manner their respective interests in the country.[1] Not being itself a party to the treaty, and being powerless to assert an independent position Abyssinia was thus reduced to a state of involuntary wardship. The guardians pledged themselves, in the event of disturbances occurring in Abyssinia, not to intervene individually except after having come to an understanding with the others, and in any such case every effort was to be made to maintain the integrity of the country. This mutual self-denying ordinance came impliedly to an end in September, 1923, when Abyssinia was admitted as a member of the League of Nations.

Administered provinces

In addition to vassal states and protectorates there are territories having so intangible a degree of international personality as to make their status a matter of doubt. The term "administered province" has been used to describe territory nominally subject to the sovereignty of one state while actually under the administrative control of another. By the Berlin Treaty of 1878 Bosnia and Herzegovina, while remaining subject to the sovereignty of Turkey, were to be "occupied and administered" by Austria-Hungary, which continued to exercise a sort of mandate over them until they were annexed by unilateral act in 1908.[2] Great Britain, under agreement with Turkey, exercised a similar administrative control over Cyprus from 1878 until the annexation of the island in 1914.[3] A self-assumed administrative mandate over Cuba was exercised by the United States from 1898 to 1902.[4]

British self-governing dominions

The international status of the British self-governing dominions is anomalous. In theory, Canada, Australia, New Zealand, and South Africa were until 1919 colonial possessions of the British Empire and had no international personality. As a practical matter, however, these colonies had attained a degree of independence in the control of their foreign as well as their domestic affairs which placed them in the category of the more advanced

[1] *Am. Journal,* I (1907), Supp. 226.
[2] Willoughby and Fenwick, *op. cit.,* 19.
[3] *Ibid.,* 34.
[4] See above, p. 92.

CHAP. VI

protectorates. The practice of the British Government in making provision for separate adherence to and separate withdrawal from commercial treaties by the dominions seemed to give them a distinct, if limited, international personality, though the mother-country remained responsible at international law for the fulfilment of their contracts. This limited status as international persons was given definite recognition at international law when the four dominions were made, each in its own name, signatories of the Treaty of Versailles and became in their separate personalities original members of the League of Nations.[1] With them as a signatory of the treaty and member of the League was included India, which consists of the native states (protectorates having almost complete internal autonomy) and of British India, which was given a limited measure of self-government under the Government of India Act of 1919.

Irish Free State

Even more unique is the international status of the Irish Free State. It came into legal being by the conclusion of the treaty of December 6, 1921,[2] between the British Government on the one hand and representatives of the Irish Sinn Fein on the other, the latter having at international law neither a *de jure* nor a *de facto* standing until the negotiations preceding the treaty. On January 8, 1922, the treaty was ratified by the Dáil Eireann, whereupon Ireland became the Irish Free State. A subsequent act of Parliament embodying the treaty gave to the new "state" the same constitutional status "in the community of nations known as the British Empire" as was held by the British self-governing dominions, naming Canada as the dominion whose relations to the Imperial Parliament were to be paralleled by those of the Free State.[3] Having adopted a constitution and organized its government, the Free State was admitted to membership in the League of Nations in September, 1923.

Territories under mandate of the League of Nations

Article XXII of the Covenant of the League of Nations rep-

[1] With the acquisition of international personality by the dominions came a corresponding change in their constitutional relations within the empire. Henceforth they were members of the British Commonwealth of Nations—a close confederation with Great Britain as the dominant partner and an Imperial Conference as the working bond of union. See M. M. Lewis, "The International Status of the British Self-Governing Dominions," *British Year Book*, 1922-23, p. 21. Newfoundland also ranks among the self-governing dominions, but its international relations have been of lesser importance than those of the other four.

[2] Technically known as "Articles of Agreement for a Treaty" and the "Scheduled Treaty." For the text, see *Annual Register*, 1921, p. 86.

[3] See *Annual Register*, 1921, Chaps. III, IV; Figgis, *The Irish Constitution*.

resents an attempt to apply in a more logical and constructive form[1] the plan of international guardianship over backward territories illustrated by the action of the Great Powers in 1815 in respect to the Ionian Islands. The principle on which the Covenant proceeds is that the well-being and development of such peoples "form a sacred trust of civilization" as represented by states parties to the Covenant. Three distinct groups of such territories are marked off. The first group consists of certain communities,[2] formerly subject provinces of Turkey, which have reached a stage of development at which their existence as independent nations can be provisionally recognized, subject to a temporary régime of administrative assistance from a mandatory state. The mandate for Syria was accepted by France, and that for Mesopotamia by Great Britain. But while it would appear that these two new states are thus endowed with some degree of international personality and attain partial membership in the international community as represented by the League, their ultimate status is still a matter of doubt.

In addition to those territories which are emancipated under the protection of stronger states, there are the former colonies of Germany, some of which are to be administered by a mandatory state under a separate form of government,[3] and others to be administered as integral portions of the territory of the mandatory state.[4] In both cases provision is made in the Covenant that the administration shall be conducted under conditions approved by the League, by which equal opportunities for trade shall be allowed to all members of the League, and certain abuses, such as the trade in slaves, arms, and liquor, shall be prohibited; further, the requirement is laid down that the mandatory shall render to the Council of the League an annual report upon the territory committed to its charge. It is doubtful whether the territories in the first of these classes may claim any degree of international personality; and it is quite clear that those in the latter class may not do so.[5]

Belligerent communities

In addition to states having a legal status at international law,

[1] Taking the terms of the Covenant at their face-value, as representing a legal relation rather than an actual condition.

[2] Designated by the Council of the League as Class A mandates.

[3] Designated by the Council as Class B mandates.

[4] Designated as Class C mandates.

[5] For a discussion of the technical legal problems involved in the establishment of mandates, see Wright, "Sovereignty of the Mandates," *Am. Journal*, XVII (1923), 691.

CHAP. VI

whether that of full membership in the international community or that of partial membership, there are cases in which political communities struggling to attain a condition of separate statehood are recognized by international law as possessing a *de facto* as opposed to a *de jure* status. These communities, legally parts of the state from which they are endeavoring to separate themselves, may attain in the course of their struggle for freedom an actual position of independence which makes it necessary for third states to deal with them as if they possessed international personality, pending the determination of the question whether they will be formally admitted to membership or will be brought back to subjection by the state from which they have revolted. They are inchoative states, permitted by the other states to exercise temporarily certain of the rights and privileges of statehood, but having in their own name not a legal, but merely a moral, claim to the protection of international law.[1]

[1] For the problems connected with the recognition of these *de facto* political communities, see below, p. 108.

CHAPTER VII

ACQUISITION OF MEMBERSHIP IN THE FAMILY OF NATIONS; CONTINUITY AND LOSS OF INTERNATIONAL PERSONALITY

a. Changing character of international persons

As has been pointed out above, the persons of international law differ in extent of territory, size of population, degree of civilization, and stability of internal political organization. This diversity is the result of a wide variety of physical and social forces—race, language, religion, culture, geographical environment—which it is for the historian to analyze. International law merely recognizes that, from whatever cause, the various national groups pass through stages of development, and are found at times breaking up into component parts or coalescing into larger communities. New groups separate themselves from old and larger groups and assert a right of distinct international personality. A number of groups combine and come before the family of nations as single corporate units. In consequence international law is presented not only with problems connected with the personal diversities of the members of the international community, but with further problems bearing upon the acquisition and loss of membership in the community. In addition to these, the corporate nature of statehood raises questions concerning the continuity of international personality when passing through changes in the internal organization of the state.

b. Acquisition of membership: recognition of new states

Membership in the existing family of nations is either original or acquired. It is original in the case of the states maintaining diplomatic relations since the time international law began to take definite shape about the middle of the seventeenth century. States subsequently admitted to the family of nations may be said to have acquired legal personality by grace of the existing members, manifested by the act of admission known as "recognition." Whether a state not a member of the family of nations has a right to demand admission, or whether it actually becomes a member so soon as it acquires the marks of a state [1] even though it may not be recog-

[1] See Hall, *International Law*, § 2.

CHAP. VII

nized as such until later, are disputed questions. Accepting international law as a system of positive law, it may be said that the right of a non-member to admission can only be moral, not legal, and that recognition by third states is essential to practical membership involving official intercourse with other states. The form of recognition may be either tacit or express. It is tacit when an older state enters into official intercourse with a new state by sending diplomatic representatives to it, concluding treaties with it, acknowledging its flag, and otherwise entering into formal relations with it. Recognition is express when a definite and explicit statement is made by which the membership of the new state is assured.

The admission to the family of nations of states already in existence but outside the circle of European civilization has been determined, as a rule, by the decision of the leading states as to the possibility of the performance by those states of the duties prescribed by international law. The case of Turkey in 1856 was exceptional, in that admission was granted rather because of the necessity of an agreement among the powers concerning the disposition of that country than because of an acknowledgment of Turkish capacity to fulfil the obligations of membership. The admission of Japan, tacit for several decades, became express in 1895, when the empire, as a result of its victory over China, won an acknowledged place in the more exclusive circle of the Great Powers. The admission of China, Persia, and Siam, likewise tacit for some years previous, became express at the time of their attendance at the Second Hague Conference, although it was attended with restrictions. Abyssinia remained legally isolated until its admission into the League of Nations in 1923.[1]

Conditions attending recognition

In the case of newly formed states within the circle of European civilization, admission to membership has been practically coincident with their acquisition of statehood whenever the new state has come into being by peaceful agreement with existing states. Norway was admitted in 1905 immediately upon its separation from Sweden. Admission has likewise been coincident with the acquisition of statehood in cases where the Great Powers have, by the power of their collective action, created new states from previously dependent territories, and in the event of the formation of a new state by federation of previously existing states. In a few instances new states have been formed in regions hitherto

[1] See above, p. 99.

unoccupied, their recognition being made dependent either upon the guardianship of one of the Great Powers, as in the case of Liberia in 1847 and the Congo Free State in 1885, or upon evidence of the stability and civilized character of their governments, as in the case of the Transvaal in 1852. Since recognition once given is practically final, it will be seen that the conditions that have been attached at times to the collective recognition of the Great Powers are more in the nature of restrictions upon subsequent conduct, qualifying, though without sanction, the rights of full membership in the international community.[1]

Recognition of revolting territories

The question of the recognition by individual powers of the independence of new states formed as the result of domestic revolution within the territory of an existing state has been frequently a subject of international controversy; but, on the whole, the law governing the subject is fairly clear. Such recognition, involving, in so far as the state giving recognition is concerned, the admission of the insurgent state to membership *de jure* in the international community, is to be sharply distinguished from the mere recognition of the *de facto* belligerency of the insurgents called for by the necessities of a state of war.[2] The conditions under which recognition of independence may be granted are, however, as in the case of recognition of belligerency, conditions of fact. Has the contest between the insurgent community and the parent state reached a point where the latter has apparently abandoned all effort, or proved the complete inadequacy of its efforts, to reduce the insurgent community to submission? Up to that time the province in revolt is left to fight its way into existence as best it can. Having proved its ability to survive, it is ready for recognition by such powers as find it to their interest to begin official relations with it.

Premature recognition

Premature recognition of the independence of a revolutionary state may constitute an offense against the parent state, being an interference with its legal right to retain control over its subjects. In certain cases it may amount to an actual act of "intervention."[3] The recognition of the United States of America by France in 1778 was unquestionably premature, and was presently followed by a declaration of war by Great Britain against France. The recognition of the independence of the South American states by the United States in 1823, and by Great Britain in 1825, was, however, justified by the facts, Spain having lost practically her last

[1] See above, p. 90. [2] See below, p. 108. [3] See below, p. 150.

CHAP. VII

foothold on the continent.[1] The same is true of the recognition of Texas by the United States in 1837. By contrast, the collective recognition by the Great Powers of the *de jure* independence of Greece in 1827 was in advance of the country's *de facto* independence; as was also their collective recognition of the independence of Serbia and Rumania in 1878, both acts of intervention being justified in their eyes by the character of the Turkish rule to which the revolting provinces had been subjected. The declaration of war by the United States against Spain in 1898 was a distinct act of intervention between a parent state and its rebelling subjects, dictated, however, not merely by sympathy with the rebellious colony but by motives of self-protection against the continuance of an international nuisance. It is significant that the resolution of Congress contained a recognition of the freedom and independence of the *people* of Cuba as distinct from the insurgent *government*, which the United States did not wish to legalize. The recognition of the independence of the Republic of Panama by the United States in 1903 followed almost immediately upon its separation from Colombia, and it must be explained, if not legally justified, on grounds other than the demonstrated ability of the insurgent body to maintain itself.[2]

Recognition of Czechoslovakia in 1918

A unique case of the recognition of a state in advance of its demonstrated ability to maintain itself is to be seen in the recognition of the independence of the Czechoslovak nation by the United States in September, 1918, at a time when the territory of the new state was under the *de facto* control of Austria-Hungary, and when there had not been and could not have been a prior recognition of belligerency. The National Council of the Czechoslovak people, which received the act of recognition, was no more than a provisional and absentee government, with headquarters in Washington, representing a number of armies fighting in the ranks of the Allies against the nation to which their brethren in the territory of the new state were still rendering a formal allegiance. Only the exigencies of war could have justified such a measure consistently with the precedents of international law.

The "right of self-determination"

If recognition has been made dependent upon a question of physical force, upon the ability of the insurgent community to maintain itself against the power of the parent state, it must be concluded that the so-called "right of self-determination" on the

[1] See Moore, *Digest*, I, §§ 28-36.
[2] *Ibid.*, III, 46 ff.

part of subject nationalities has not attained the validity of a legal rule. International law knows at present no right of rebellion belonging to oppressed peoples; it merely registers the fact that as a result of certain rebellions a point has been reached where the community in revolt has made good its claim to independence and is ready for admission as a *de jure* member of the international community. There are, it is true, precedents, as in the case of Greece and the Balkan states, involving the collective action of the Great Powers in decreeing the independence of a subject nationality; but in both instances the parent state was one whose legal rights the Great Powers were not reluctant to consider forfeited. The intervention of the Great Powers in behalf of Belgium in 1831 forms perhaps a precedent, though even here there were personal interests at stake, as the treaty of naturalization bears witness. The successive outbreaks in Poland in the nineteenth century, the rebellion in Canada in 1837, the uprising in Hungary in 1848, the revolt in Egypt in 1882, were left to be suppressed by the state in legal control of the territory without concern on the part of third states. Napoleon III, as an individual ruler, gave a marked impulse to the principle of nationality during the third quarter of the nineteenth century; but that principle found no foothold in the public law of Europe.[1]

Conditions qualifying self-determination

Upon the entrance of the United States into the World War the more immediate object of defeating the enemy became associated with the declaration of certain principles of a just and lasting peace. Among those principles was the readjustment of frontiers "along clearly recognizable lines of nationality," as well as the establishment of the independence of Poland and the autonomous development of the nationalities of Austria-Hungary and Turkey.[2] The Peace Conference created new states in conformity with these principles; but since the creative decree was pronounced only in favor of the subject nationalities of the defeated powers, it cannot be said that there was a definite recognition of self-determination as a principle of international law. Political and economic conditions still qualify the application of the principle in a given case, such as that of Ireland; and there has been no relinquishment by the powers of their right to treat as a domestic

[1] See below, p. 234, where the question of plebiscites in connection with the transfer of territory is discussed.

[2] See Nos. 9-13 of the "fourteen points." Ogg and Beard, *National Governments and the World War*, 565.

CHAP. VII

issue the question of self-determination when arising within their borders. The concession by Great Britain of autonomy to Ireland and of independence to Egypt did not come within the scope of international law.[1] The promise of the United States to give self-government to the Philippine Islands is, so far as international law is concerned, one to be kept at such time and under such circumstances as the judgment of the American Government shall think fit.

Recognition of belligerency

Closely connected with the problem of the recognition of new members of the international community is the problem of the recognition of the belligerency of political groups in revolt against the state of which they are legally a part. Such bodies have attained at times a position of *de facto* control over the territory occupied by them which has entitled them to be recognized as lawful belligerents, without, however, being able to claim, or succeeding in obtaining, recognition of the status of *de jure* statehood. The problem is one dating from the beginning of the nineteenth century when the revolt of the South American colonies from their mother-country made it necessary for Great Britain and the United States to formulate new rules in justification of an attitude toward the revolted colonies based upon principles both of humanity and of self-protection. It was impossible to regard such colonies, organized as separate states and conducting a war in behalf of political freedom, as mere groups of rebels against their lawful government, devoid of rights under international law. In consequence, it came to be held that where a *de facto* political organization had been set up, giving promise of being able to maintain itself, and conducting military and naval operations in accordance with the laws of war, and where, on the other hand, the parent state was exercising the belligerent rights of visit and search and of blockade, the situation must be recognized as one of public war.

Effects of recognition

The effect of this recognition by third states of belligerent rights on the part of insurrectionists is to confer upon them a *de facto* international character in respect to the rights and duties of legal warfare. These include the right of admission of ships of the insurgents into the ports of the recognizing state, the right to borrow money on the credit of the *de facto* state, and principally the right of visit and search at sea, the confiscation of contraband goods, and the maintenance of blockade. The accompanying responsibilities can, of course, only be made good if the insurrection

[1] Regarded here as a positive system confined to principles generally recognized and to rules actually observed.

ultimately succeeds. At the same time, the act of recognition imposes upon third states the obligations of formal neutrality between the contending parties. Since both consequences are burdensome to the state giving recognition, its action is, as a rule, dictated either by sympathy with the rebellion or by the necessity of warning its citizens against the exercise of the rights of war by the *de facto* state and protecting them against illegal acts of either belligerent.

Controversies as to the time of recognition

Precipitate action on the part of third states in recognizing the *de facto* status of belligerent communities is an offense against the parent state, but it is difficult to determine the precise moment in advance of which recognition would be premature. The action of the United States in recognizing the belligerency of the South American states during the first quarter of the nineteenth century was regarded by Spain and the Holy Alliance as premature; but it was founded upon a fair basis of fact [1] and was dictated partly by sympathy with the revolutionists and partly by a desire, as expressed in the Monroe Doctrine, to prevent the extension of the European system to the American continent. The recognition of the belligerency of Greece by Great Britain in 1825 was similarly inspired by sympathy with the effort of that country to throw off the yoke of Turkey. In justification of its recognition of the belligerency of the Confederate States in 1861, Great Britain argued that her proclamation of neutrality followed both the proclamation of President Davis announcing the purpose of the *de facto* Confederate Government to exercise the rights of a belligerent and the proclamation of President Lincoln announcing the blockade of the Southern coasts. Inasmuch as British shipping interests were seriously affected by both proclamations, the British Government maintained that its act of recognition was not premature.[2] On the other hand, the United States insisted, first, that the rebellion of the Southern States did not amount to a state of war, and, later, that even if a state of war existed there was no necessity for the action of the British government.[3] On the other hand, the unwillingness of Denmark to accord recognition of belligerency to the United States in 1779, expressed by the refusal to grant asylum

[1] See Moore, *Digest*, I, § 36.

[2] See *ibid.*, I, § 66.

[3] The controversy fills a large place in the literature of international law following 1861. It is now generally conceded by American writers that the position taken by the United States was an extreme one. See Moore, *Digest*, I, § 66; *Papers Relating to the Treaty of Washington*, I, 19-46.

CHAP. VII

to prizes captured by John Paul Jones from Great Britain, was regarded as an unfriendly act by the United States when its independence was attained, and claims were entered for compensation for the delivery of the prizes to Great Britain.[1]

Recognition of insurgency

Distinct from the recognition of the belligerency of a *de facto* state in revolt against the mother-country is the recognition of a "status of insurgency." Such recognition may be given either to a group of revolutionists who are endeavoring to obtain the liberation of their country from a parent state, but who are unable to effect an organization capable of being recognized as a legal belligerent, or, on the other hand, to a group of revolutionists who are attempting to overthrow the established government of their country without themselves seeking to set up a new state. Both situations are peculiar to the American continent, and the law governing them is not well defined. Recognition of insurgency of the first type has several times been given by the United States with the primary object of bringing into effect the neutrality laws applicable to a state of war. At the same time such recognition has expressed a belief on the part of the recognizing power that the insurgents should not be treated by the mother-country as mere traitors and pirates, and, on the other hand, a willingness to submit to measures taken by the insurgents to prevent the access of supplies to the forces of the parent government, without, however, giving them the right of visit and search at sea. In 1895 President Cleveland recognized the insurgency of the Cuban revolutionists and enjoined the observance of the neutrality laws.[2] During the following year, in the case of the *Three Friends*,[3] the Supreme Court upheld the distinction "between recognition of belligerency and recognition of a condition of political revolt," and condemned, under the terms of the act of 1818, a vessel which had been fitted out and armed in the United States on behalf of Cuban insurgents unrecognized as belligerents.

Recognition of the insurgency of revolutionists seeking the overthrow of an established government has been given sometimes with the object of enabling the state giving recognition to put into effect its neutrality laws, at other times with the object of enabling it to demand from the insurgents the protection of the lives and property of its citizens, and again with the object of defining the

[1] Moore, *Digest*, I, § 60.
[2] *Ibid.*, 242.
[3] 166 U. S. 1 (1897). Scott, *Cases*, 830; Evans, 66.

extent to which it will acquiesce in the exercise of belligerent rights by the insurgents. During the revolution in Chile in 1891 the United States applied its neutrality laws to the extent of demanding from the insurgent Congressionalist party the surrender of a vessel, the *Itata*, which had obtained supplies of arms in the United States.[1] Compensation was subsequently made by the United States for the violation of Chilean territory involved in the pursuit of the vessel on the high seas and the demand for the surrender of the vessel in Chilean waters.[2] During the Brazilian revolution of 1893 the United States instructed its minister to warn the commander of the insurgents in the harbor of Rio de Janeiro that American vessels must be free to load and unload their cargoes without interference by the insurgents, provided they did not cross the actual lines of fire. Similar orders were issued by the English, French, German, and other naval commanders present, who in addition notified the insurgent commander that force would be used by them to prevent a bombardment of the city.[3] During the revolution in Colombia in 1885 the United States refused to recognize the validity of a decree of the *de jure* president of Colombia closing to foreign trade certain ports held by the insurgents unless the decree should be supported by an effective blockading force.[4]

c. Continuity of international personality

Once a member of the international community, a state retains the same personal identity in spite of any changes that may take place in its internal organization and government. France remained France throughout its many changes of government from 1791 to 1870. In the case of the *Sapphire*,[5] decided in 1871, it was held by the Supreme Court of the United States that the deposition of Napoleon in no way affected a suit brought in the name of the emperor to obtain damages for losses to a French transport injured in collision with the American ship *Sapphire*.[6] Where,

[1] See below, p. 252. Also U. S. *v.* Trumbull, 48 Fed. Rep. 99 (1891).
[2] See Moore, *International Arbitrations*, III, 3067; Scott, *Cases*, 367.
[3] Moore, *Digest*, I, § 70.
[4] *Foreign Relations, U. S. 1885*, 252, 264.
[5] 11 Wallace, 164 (1870). Scott, *Cases*, 68; Evans, 76.
[6] "The next question," said the court, "is, whether the suit has become abated by the recent deposition of the Emperor Napoleon. We think it has not. The reigning sovereign represents the national sovereignty, and that sovereignty is continuous and perpetual, residing in the proper successors of the sovereign for the time being. Napoleon was the owner of the *Euryale*, not as an individual, but as sovereign of France. This is substantially averred in the libel. On his deposition the sovereignty does not change, but merely the person or persons in whom it resides." *Ibid.*, loc. cit.

CHAP. VII

however, changes in the form of a government are sudden and abrupt, such as the transition from a monarchy to a republic or vice versa, or where, without change of form, changes in the personnel of the government take place by revolution or violence, it is the right of third states to refuse or delay recognition of the new government until such time as it has shown that it is sufficiently well established to be able to speak with authority in the name of the state and to be answerable for its obligations. International law thus leaves it to each state to determine for itself the time at which it will regard the new government as backed by a responsible public opinion, and as therefore competent to pledge the future conduct of the state. As in the case of the recognition of a new state, the test applied has been generally one of fact and has taken no account of the domestic issues involved in the establishment of a new government. The distinction between the two cases of the recognition of a new state and the recognition of a new government must, however, be sharply observed, since in the latter case there is no issue of the legal rights possessed by the state as such, but merely the issue as to who is competent to speak in the name of the state.

Recognition of de facto governments

Pending formal recognition, third states may give provisional recognition to the new government as being *de facto* in control. By this means diplomatic relations may be kept up without interruption and affairs of ordinary business transacted. Formal recognition, if ultimately given, is retroactive in effect, and operates to validate the actions and conduct of the new government from the commencement of its existence.[1] On the other hand, even if ultimate recognition be not given the state may be held responsible for the acts of the *de facto* government in its official character; so that loans contracted or other obligations entered into with foreign citizens by such a government may be binding upon a succeeding *de jure* government.[2] Special problems, unsettled at law, arise where a government has been recognized by one or more states and not by others, and where it is later superseded by a new government which refuses to recognize the legal validity of the acts of its predecessor.

Political considerations influencing non-recognition

The practical test of the stability of a new government as determining its abstract right of recognition has at times been subordinated to the concrete issue of the political principles professed by the new government and the personal character of its

[1] See Octjen *v.* Central Leather Co., 246 U. S., 297 (1918). Scott, *Cases*, 70.
[2] See Borchard, *Diplomatic Protection of Citizens Abroad*, 206.

officials as affecting the interests of third powers. The delay in the recognition of the republican government of France in the years following 1791 was largely due to fear on the part of monarchial governments lest recognition should encourage the spread of revolutionary principles beyond the borders of France. By contrast, Jefferson, as secretary of state in 1792, declared himself ready "to acknowledge any government to be rightful which is formed by the will of the nation, substantially declared."[1] On the other hand, the transition of France from an empire to a republic in 1870 during the course of the Franco-Prussian War, was recognized without undue delay.[2] The overthrow of the empire in Brazil in 1889 by a "bloodless revolution" was followed by immediate recognition of the provisional government by the United States, formal recognition being given when it was clear that a majority of the people supported the new government.[3] In 1903, when the royal Obrenovitch family was assassinated in Serbia, there was some hesitancy in recognizing King Milan; but the apparent acceptance by the people of Serbia of the new dynasty finally overcame the scruples of the reluctant states. In the case of the revolution in Portugal in 1910, there was some delay in according recognition, due in part perhaps to sympathy with the monarchy; but by the time of the adoption of the new constitution in August, 1911, there could no longer be question as to the stability of the new government.

American attitude toward *de facto* Mexican governments

The recognition by the United States of the Obregon government in Mexico in August, 1923, came after four years of suspended diplomatic relations. The case dates from the deposition of President Madero in 1913. President Huerta was refused recognition by the United States on the ground that the establishment of his government had been accompanied by violence and murder. A new principle of recognition was announced by President Wilson in accordance with which the favor of American recognition was to be made contingent upon "the orderly processes of just government based upon law, not upon arbitrary or irregular force."[4] Nevertheless, the United States was compelled to deal with Huerta indirectly as the head of a *de facto* government, and in the matter

[1] Moore, *Digest*, I, § 43.

[2] On the part of the United States, President Grant promptly telegraphed his congratulations as soon as he had "learned that a republican body had been proclaimed at Paris, and that the people of France had acquiesced in the change." Moore, *Digest*, I, § 43.

[3] *Ibid.*, § 55.

[4] Statement issued March 11, 1913. See *Am. Journal*, VII (1913), 331.

CHAP. VII

of the Tampico incident the American State Department put itself in the position of demanding from Huerta an apology in the name of Mexico while still denying him a *de jure* official character. After the fall of Huerta the government of President Carranza was recognized, first as *de facto* in 1915, and later as *de jure* in 1917. Three years later Carranza was himself driven from office, and after an interval of transitional government President Obregon was duly elected and took office January 1, 1920. The United States, however, withheld recognition pending reassurances as to the protection of American interests in Mexico, which appeared to be threatened by Article 27 of the constitution of 1917.[1] After long negotiations during the spring of 1923 the Mexican Government was finally recognized on August 31, 1923.[2] Recognition was attended by an implied promise on the part of Mexico to follow the interpretations placed by the Mexican commission upon legislation respecting agrarian and petroleum rights under the constitution of 1917. These interpretations were reported by the American commission as adequately protecting the rights of American citizens owning land or holding concessions in Mexico.[3] Shortly after, two claims conventions were signed, one relating to general claims, the other covering the special claims for losses suffered by Americans from the revolutionary conditions prevailing from 1910 to 1920.

The *de facto* Bolshevik Government of Russia

In the case of the Bolshevik Government of Russia, established in November, 1917, recognition was withheld by the United States and other powers at the start partly because of uncertainty as to its tenure and partly because of its desertion of the Allied cause by the conclusion of a treaty of peace with Germany. At the close of the war recognition was still refused, chiefly upon grounds of the Bolshevik political principles, though it was insisted in certain

[1] Art. 27 provides that "the ownership of lands and waters comprised within the limits of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property." Further, the ownership of all minerals, solid mineral fuels, and petroleum is vested directly in the nation. For the full text, see *Annals of the Am. Academy of Political and Social Science*, Supplement, May, 1917, pp. 15-25.

[2] Recognition took the form of an announcement on the part of the American Department of State that, in view of the reports of their respective commissions, the two countries had resolved to renew diplomatic relations. The earlier proposal, objectionable to Mexico, of recognition in the form of a treaty containing the desired guarantees, was abandoned.

[3] The student may compare the terms of the Huerta-Lamont financial agreement of June, 1922, which, although unofficial on the part of the American bankers, removed one of the obstacles to recognition.

quarters that the despotic character of Bolshevik rule made it questionable whether its apparently firm tenure really represented the will of the Russian people. Even provisional recognition was denied by most of the powers. Various proposals were made from time to time during 1921 and 1922 looking to recognition upon conditions.[1]

Effect of changes in population and territorial area

The identity of a state's international personality is likewise retained in spite of changes in the size of its population and in the extent of its territory, provided the latter do not affect the state's unitary character.[2] Poland retained its personality in spite of the partitions of 1772 and 1793, losing it only after the third partition of 1795. Heavy losses of territory by Prussia in 1807, by Turkey in 1878, and by Russia and Turkey in 1919 had no effect upon their corporate character as international persons. By contrast, the personality of the original republic of Colombia failed to survive the division of the state in 1829-30 into Venezuela, Ecuador, and New Granada, each of the three divisions requiring separate recognition as a new state.[3] Had the Confederate States won their independence in 1861-65, the identity of the United States would apparently not have been affected thereby. Upon the suppression of the *de facto* Confederate Government it was held by the courts of the United States, as a point of constitutional law, that the seceding States had never been legally out of the Union.[4]

On the other hand, the fourfold increase of territory won by Sardinia in 1859-61, together with its change of name, left it the same corporate person. So also the United States is the same person in law to-day as it was before 1789. Special obligations may accrue to the enlarged state in such cases, but these bear no relation to the continuous identity of the state. When, however, an

[1] In justification of the policy of the United States Secretary Hughes, on March 21, 1923, stated that: "The fundamental question in the recognition of a government is whether it shows ability and a disposition to discharge international obligations. Stability, of course, is important; stability is essential. Some speak as though stability was all that was necessary. What, however, would avail mere stability if it were stability in the prosecution of a policy of repudiation and confiscation? In the case of Russia we have a very easy test of a matter of fundamental importance, and that is of good faith in the discharge of international obligations. I say that good faith is a matter of essential importance because words are easily spoken. Of what avail is it to speak of assurances, if valid obligations and rights are repudiated and property is confiscated?" *Am. Journal*, XVII (1923), 296. See also the statements of Secretary Colby, Aug. 10, 18, 1920. Hyde, *International Law*, I, § 45.

[2] See above, p. 84.

[3] Moore, *Digest*, I, § 36.

[4] Keith *v.* Clark, 97 U. S. 454 (1878). Evans, *Cases*, 78.

CHAP. VII

increase of territory is brought about by the union of the state with another international person as a distinct corporate unit, the continuity of the first state's identity may be broken.[1]

d. Extinction or loss of international personality

International personality, acquired in conformity with definite rules regulating recognition, is lost by the operation of facts over which international law exercises no control. It is lost in its entirety when a state simply ceases to exist as such, whether as the result of conquest or other forcible annexation, or as the result of voluntary incorporation into a larger federal union or into a single state, or the voluntary division of the state into distinct legal units. In all such cases international law concerns itself not with the fact that a member of the international community has become extinct, but solely with the question whether a new state has been created which must be recognized, or whether new obligations affecting the rights of third parties have been incurred by the state conquering or incorporating the extinct state. Extinction as a result of forcible annexation is seen in the case of Poland in 1795, in the case of the Transvaal in 1901, and in the case of Korea in 1910. Extinction by voluntary incorporation in another state is seen in the merger of Texas into the United States in 1845, and in the more recent merger of Montenegro and Serbia into Jugoslavia in 1919. Whether the incorporation of a state into a confederation causes extinction of personality depends upon the nature of the confederation, since the name has been made to cover unions of varying degrees of closeness. Incorporation into a federal union usually causes extinction.[2] Hence the decision in the case of Terlinden *v.* Ames[3] decided in 1910, holding that a treaty of extradition entered into by the United States with Prussia in 1852 continued to bind Prussia as a member of the German Empire, proceeded upon a wrong basis. The question should have been decided on the point of the succession of the German Empire to the rights of Prussia.[4]

Partial loss of personality

Partial loss of international personality takes place when a state becomes incorporated into another state without losing its identity as a state, though foregoing or abandoning the exercise of its external sovereignty. Here again international law is indifferent to the fate of the state whose personality is diminished, and

[1] See above, pp. 95-96.
[2] Depending, in the particular case, upon the closeness of the federal bond.
[3] 184 U. S., 270 (1902). Scott, *Cases*, 473 n.; Evans, 92.
[4] See below, p. 117, n. 3.

is solely concerned with the fulfilment of the obligations of the partially extinct state by the state into which it is incorporated. Tunis, Madagascar, and more recently Morocco suffered a partial loss of international personality in becoming protectorates of France, although they had not previously enjoyed formal membership in the family of nations. Guatemala, Honduras, Salvador, and Costa Rica suffered a partial loss of personality upon their entrance into the Central American Federation in 1921.[1]

e. Succession of states

Closely associated with the special problems connected with the acquisition, continuity, and loss of international personality is the difficult, and as yet largely unsettled, problem of the extent to which one state succeeds to the rights and obligations of another in cases of change of sovereignty over a given area of territory. The idea of a succession of international persons was introduced into international law by Grotius as a corollary of the rule of Roman civil law by which an heir became the substitute in law of the deceased person and was clothed with the latter's rights and obligations.[2] But in consequence of the peculiar circumstances arising from the corporate personality of the state, the rule of law laid down by Grotius proved impossible of strict application; and down to the present day there has been no general agreement as to whether a true legal succession takes place or, if not, what practical rules of succession are to be inferred from precedents offered by the actual practice of states.

Universal succession

Succession is said to be universal when, in consequence of the complete absorption of the international personality of one state into that of another, the latter becomes the sole representative at law of the rights and obligations of the former. Universal succession may follow as the result of the annexation of the extinct state by conquest or other forcible means, or as the result of the incorporation of the extinct state into a larger federal union [3] or into a unitary state. It may also follow as the result of the extinc-

[1] For details, see P. M. Brown, "The Federation of Central America," in *Am. Journal*, XV (1921), 255.

[2] *De Jure Belli et Pacis* (Eng. trans.), Bk. II, Chap. XIV, § XI; also Bk. II, Chap. IX, § XII.

[3] Prussia actually became extinct as an international person in 1866. Compare, however, the dictum of the Supreme Court of the United States in the case of Terlinden *v.* Ames, 184 U. S., 270 (1902), holding that "it does not necessarily follow [from the fact of the formation of the German Empire] that the kingdom of Prussia lost its identity as such, or that treaties theretofore entered into by it could not be performed either in the name of its king or that of the German Emperor."

CHAP. VII

tion of a *de facto* state, such as the Confederate States from 1861-65.[1] The division of a state into a group of separate states may also give rise to universal succession, but in this case there are as many successors at law as there are separate states. In cases of universal succession the question of the extent to which the annexing or incorporating state succeeds to the rights and obligations of the extinct state is one between itself and third states claiming interests in the annexed and incorporated state.

Partial succession

Succession is said to be partial when an existing state takes over, whether by forced or voluntary cession, the sovereignty of a portion of territory formerly belonging to another state, as in the case of the annexation of California by the United States in 1847; or again when a new state is formed by breaking off from a larger state, as in the case of the United States in 1776; or when a state previously a member of a federal state or of a confederation, or previously a protectorate of another state, obtains its complete independence. In such cases the problem presented is the distribution between the two parties—the one acquiring and the other losing sovereignty over the territory—of the rights and obligations attached to it. The issue may be one concerning only the two principals in the case, or it may concern third states as well when they have claims in respect to the territory in question.

Conditions of universal succession

Where the succession is *universal,* a distinction must be made between rights and obligations associated with the international personality of the extinct state and rights which have become vested in the territory of the state, together with obligations created by treaties or contracts already executed in whole or in part. In the former class are the rights and obligations arising from political treaties, such as treaties of alliance, of arbitration, and of neutrality, which relate to the future policy of the state under a given set of conditions. These are abrogated upon the extinction of the state which concluded them. In the same class are the rights and obligations arising from treaties of commerce and navigation and of extradition, which, though relating to matters of more general interest, nevertheless represent a give and take between the parties based upon their character as international persons. These treaties possibly continue in force by implied consent,[2] but in any case they may be canceled at the option either of the annexing state or

[1] See United States *v.* Prioleau, 2 H. & M., 559 (1865). Scott, *Cases,* 90; Evans, 84.

[2] Writers are at variance on this point, international practice not having been uniform.

of the other party. On the other hand, rights which have become vested in the extinct state pass by succession to the annexing state. Obligations created by executed or dispositive treaties likewise pass by succession according to the principle, *res transit cum onere.* Among such rights are the ownership of the public property of the extinct state, credits owing to the extinct state, easements possessed by the extinct state in respect to the public or private property of third states, etc. In the case of United States *v.* Prioleau,[1] decided in 1866, it was held that upon the extinction of the *de facto* Confederate States cotton owned by them passed of right to the United States, but that the latter took the property subject to the obligations of the Confederate Government to Prioleau.[2] A close analogy is here found with the covenants running with the land in the common law of Great Britain and the United States.

The assumption by the annexing state of the obligations of the extinct state created by executed contracts is subject to exceptions which make the validity of the general rule of succession somewhat doubtful.[3] Servitudes, i.e., the obligation to permit a third state to enjoy an easement in respect to territory, such as a right of transit through the territory, coastal fishing rights, etc., undoubtedly must be taken over by the successor. Contractual obligations with third states or with their citizens, such as concessions for the development of mines or railways, have generally been assumed by the annexing state.[4] The case with respect to debts contracted by the extinct state is not so clear. In general they have been taken over, but there are many precedents to the contrary. The United States took over the debts of its member states in 1790.[5] By contrast, the United States refused in 1845 to permit the debts and liabilities of the annexed Republic of Texas to become a charge upon itself, provision, however, being made for the payment of the same by Texas from the sale of public lands.[6] Italy assumed part of the papal debt in 1864, while Prussia took over the debts of

[1] 2 H. & M., 559 (1865). Scott, *Cases,* 90; Evans, 84.

[2] See also the case of United States *v.* Smith, 1 Hughes Rep., 347 (U. S. Circuit Court, 1877), in which it was held that a debt owing to the Confederate Government passed by right of conquest to the United States.

[3] The rule that a state which has annexed another state is legally bound by contracts made by the extinct state was expressly denied by the Transvaal Concessions Commission, which at the same time admitted that the modern usage of nations tended in that direction. This position, however, is contested by leading British writers. See Oppenheim, *Int. Law,* I, § 82.

[4] For the practice of the United States, see Moore, *Digest,* I, § 98.

[5] For details, see Channing, *History of the United States,* IV, 70-79.

[6] Moore, *Digest,* I, 343 ff.

CHAP. VII

the annexed German states in 1866. In the case of the West Rand Central Gold Mining Co. *v.* Rex,[1] the British court refused to hear the suit, brought by a citizen of the annexed Transvaal Republic, based upon funds confiscated by the republic during the war. Had the plaintiff been the citizen of a third state it would appear that his claim might have been successfully pressed through the mediation of his government, notwithstanding the fact that the money confiscated had been used by the Transvaal Government for the prosecution of the war.

Conditions of partial succession

Where the succession is partial the same distinction is drawn between rights and obligations of a character personal to the state losing the territory and rights and obligations of a local nature associated with the physical property of the territory. Two distinct but closely related cases are presented. If an existing state takes over territory by way of forced or voluntary cession from another it does not succeed to rights and obligations connected with the political treaties entered into by the former owner. On the other hand, it does succeed to vested local rights such as the ownership of public property, and possibly (but doubtfully), easements, such as special rights of navigation, or rights of way. Corresponding local obligations must be assumed. In the matter of succession to debts it is not, however, clear what debts are local as distinct from the general public debt of the ceding state. There are a number of cases in which the public debt of the state ceding the territory has been ratably divided between itself and the ceded territory, the latter portion being assumed by the successor;[2] but there would appear to be no legal obligation in the matter. The United States recognized no obligation to take over any part of the Mexican public debt because of the cession of California in 1848. On the other hand, debts contracted for the benefit of local improvements and, it may be, secured by local revenues, must be taken over. In 1898 the United States refused to take over, on behalf of Cuba, the debt settled upon Cuba by Spain before the war, arguing that the debt had not been created by Cuba as a province or incurred by Spain for the benefit of Cuba.[3] Nor was the Philippine debt assumed, though a sum approximating to it was paid for the cession of the island.

Where a new state is formed by breaking off from an old one,

[1] L. R. 2 K. B. 391 (1905). See above, p. 78.

[2] See Hershey, *Essentials of International Public Law*, 136 n. 13, where the leading instances are cited.

[3] Moore, *Digest*, I, § 97.

Rights and obligations of a new state

its position in respect to succession parallels in general that of the state obtaining territory by annexation. Political treaties of the old state do not bind it. Local property rights are taken over. Local easements may or may not pass according to their vested character. The United States claimed in 1818 that fishing rights along the coasts of Newfoundland were merely confirmed, not granted, by the treaty of peace of 1783, since it already had title to them as successor to the rights of the original colonies. But this claim could not be successfully maintained, and the new treaty of 1818 made specific reference to a "liberty" to fish, instead of the imprescriptible *right* that had been claimed.[1] Local obligations, contracted with direct reference to the territory, must be assumed. Local debts must also be taken over. Precedents exist in favor of a ratable apportionment of the general public debt of the old state; but there would appear to be no legal obligation in the matter. Belgium was made to pay a portion of the Netherlands debt by the treaty of 1839, and Montenegro, Serbia, and Bulgaria were made to take over part of the general debt of Turkey in 1878; but in both instances external pressure was brought to bear upon the new states.

Provisions of the treaties of 1919

By the terms of the Treaty of Versailles the powers to which German territory was ceded acquired all property belonging to the German Empire and to the German states, and in return were obligated to pay to the Reparations Commission the value of such acquisitions as fixed by the commission.[2] An exception was made in favor of the free acquisition by Poland of former Polish state property. Moreover, the succession powers undertook to pay a portion of both the debt of the German Empire and the debt of the German state to which the territory belonged, as those debts stood on August 1, 1914, the amount in each case being determined by the Reparations Commission.[3] An exception was made in the case of Alsace-Lorraine on the ground that Germany had refused in 1871 to undertake any portion of the French debt. A further exception was made in the case of Poland in respect to that portion of the German debt attributable to the measures taken by the German and Prussian Governments for the German colonization of Poland.[4] Similar provisions are contained in the Treaties of St.-Germain and Trianon in respect to the succession of the new states

[1] Moore, *Digest*, I, §§ 163-164.
[2] Art. 256. *Am. Journal*, XIII (1919), Supp. 281.
[3] Art. 254.
[4] Art. 255.

CHAP. VII

of Czechoslovakia and Jugoslavia to the rights and obligations of the former Austrian and Hungarian states.[1]

Status of inhabitants of transferred territory

The status of the inhabitants of territory passing from one state to another is, in general, a problem of domestic law as opposed to international law, since individuals have, properly speaking, no rights at international law. As a rule, treaties of cession contain special stipulations with respect to the continued enjoyment by the inhabitants of the rights of person and property enjoyed by them as citizens of the ceding state;[2] but such stipulations relate to the law of treaties, not to that of succession. In so far as citizens of third states happen to be resident in the transferred territory their status is properly a matter of concern to their home governments. In such cases the third state may intervene to protect them; but in so doing it appeals, not to the obligations of the annexing state as successor to the ceding state, but to the general obligation of all states to accord just treatment to aliens.[3]

[1] *Am. Journal,* XIV (1920), Supp. 94 (Austria); XV, Supp. 1 (Hungary). See also the Treaty of Lausanne, July 24, 1923, Art. 46-57, in accordance with which the Ottoman public debt was apportioned between the new Turkey and its detached parts.

[2] See below, p. 241.

[3] See below, p. 156. Compare the advisory opinion rendered by the Permanent Court of International Justice on September 10, 1923, upon questions relating to the property rights of settlers of German origin in the territory ceded by Germany to Poland. *Advisory Opinions,* Series B, No. 6. M. O. Hudson, "The Second Year of the Permanent Court of International Justice," *Am. Journal,* XVIII (1924), 13.

PART III

SUBSTANTIVE INTERNATIONAL LAW

CHAPTER VIII

THE RIGHTS OF INTERNATIONAL PERSONS

Character of international rights

The primary function of law as a rule of conduct consists in defining rights and prescribing the duties corresponding to them. These rights and duties, as defined by the law, constitute what is called in the terminology of municipal jurisprudence the "substantive law," as distinct from the law of procedure, which prescribes the methods by which legally recognized rights and duties are made effective. Looking upon law as a positive system, consisting of rules actually observed, without reference to their abstract justice or injustice, a legal right is the power possessed by a person to act in a given way with the support and protection of the community. A legal duty is the corresponding obligation of a person to submit to the exercise of another's right.

Borrowing the terminology of municipal jurisprudence, *substantive international law* may be said to consist in the rights and duties defined by the law, apart from the procedure by which redress may be obtained for violation of them. Since in the eye of international law states are moral or juristic persons, they are held to have rights and duties which bear in many respects a close analogy to the rights and duties of citizens under municipal law. Comparisons and contrasts may therefore be made between the two classes of rights for purposes of illustration and elucidation.[1] But in so doing the error must be avoided of attempting to deduce

[1] An elaborate comparison between international law and municipal law is contained in a resolution, followed by a "Declaration of the Rights and Duties of Nations," adopted by the American Institute of International Law on January 6, 1916, at its meeting at Washington. The text of the resolution and of the accompanying Declaration is as follows: "Whereas, the municipal law of civilized nations recognizes and protects the right to life, the right to liberty, the right to the pursuit of happiness, as added by the Declaration of Independence of the United States of America, the right to legal equality, the right to property, and the right to the enjoyment of the aforesaid rights; and

"Whereas, these fundamental rights, thus universally recognized, create a duty on the part of the peoples of all nations to observe them; and

"Whereas, according to the political philosophy of the Declaration of Independence of the United States, and the universal practice of the American Republics, nations or governments are regarded as created by the people, deriving their just powers from the consent of the governed, and are instituted

CHAP. VIII

certain rights as necessarily belonging to states because they have come to be regularly associated with the rights possessed by citi-

among men to promote their safety and happiness and to secure to the people the enjoyment of their fundamental rights; and

"Whereas, the nation is a moral or juristic person, the creature of law, and subordinated to law as is the natural person in political society; and

"Whereas, we deem that these fundamental rights can be stated in terms of international law and applied to the relations of the members of the society of nations, one with another, just as they have been applied in the relations of the citizens or subjects of the states forming the Society of Nations; and

"Whereas, these fundamental rights of national jurisprudence, namely, the right to life, the right to liberty, the right to the pursuit of happiness, the right to equality before the law, the right to property, and the right to the observance thereof are, when stated in terms of international law, the right of the nation to exist and to protect and to conserve its existence; the right of independence and the freedom to develop itself without interference or control from other nations; the right of equality in law and before law; the right to territory within defined boundaries and to exclusive jurisdiction therein; and the right to the observance of these fundamental rights; and

"Whereas, the rights and the duties of nations are, by virtue of membership in the society thereof, to be exercised and performed in accordance with the exigencies of their mutual interdependence expressed in the preamble to the Convention for the Pacific Settlement of International Disputes of the First and Second Hague Peace Conferences, recognizing the solidarity which unites the members of the society of civilized nations;

"Therefore, The American Institute of International Law, at its first session, held in the City of Washington, in the United States of America, on the sixth day of January, 1916, adopts the following six articles, together with the commentary thereon, to be known as its Declaration of the Rights and Duties of Nations:

"I. Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states.

"II. Every nation has the right to independence in the sense that it has a right to the pursuit of happiness and is free to develop itself without interference or control from other states, provided that in so doing it does not interfere with or violate the rights of other states.

"III. Every nation is in law and before law the equal of every other nation belonging to the society of nations, and all nations have the right to claim and according to the Declaration of Independence of the United States, 'to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them.'

"IV. Every nation has the right to territory within defined boundaries and to exercise exclusive jurisdiction over its territory, and all persons whether native or foreign found therein.

"V. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe.

"VI. International law is at one and the same time both national and international: national in the sense that it is the law of the land and applicable as such to the decision of all questions involving its principles; international in the sense that it is the law of the society of nations and applicable as such to all questions between and among the members of the society of nations involving its principles." *Am. Journal,* X (1916), 124.

The student should investigate how far the "rights" here asserted as belonging to states correspond to the actual conditions of international relations, so as to warrant the designation of them as "law."

zens under national law.[1] Thus the actual, and in that sense legal, rights and duties of nations must be sharply distinguished from certain moral or "natural" rights and duties ascribed to nations by the older writers on international law. Undoubtedly states, being composed of individuals recognizing certain moral laws, have themselves a moral character and are subject to moral laws; but in so far as this moral code of conduct is not actually observed and enforced it must be kept apart from legal rights and duties and made to serve its proper function of furnishing a standard or critique by which legal rights and duties may be judged.[2] In like manner rights and duties, ascribed to states on the basis of a rational inference from an imaginary state of nature antecedent to the establishment of an international society or community, must be set aside as of purely theoretical value.[3]

Fundamental rights

International custom has given sanction to a distinction between the fundamental, essential, or inherent rights of nations and their secondary, derived, or contingent rights. The former group includes those rights which by custom have become associated with the very fact of membership in the international community. They are, as it were, the essential conditions of state existence, and are thus so intimately bound up with the international personality of the state as to make the violation of them an offense of the gravest character. Different names have been assigned to them from time to time in international documents and in the writings of publicists, and no consistent terminology or legal classification has won acceptance.[4] Borrowing the terminology of municipal law, these fundamental rights of states may be classified as the right of life or of state existence, the right of liberty of action or of independence, and the right of property, involving the ownership and exclusive control over the territory within the boundaries of the state. Included in these are the rights so immediately derived from them as to be practically identified with them; as, for example, the right of self-preservation or self-defense is practically identified with the right of existence, and the right to the use of

[1] This, as has been seen (above, p. 51), was the common error of the earlier writers who sought to fill up the gaps in international law by resorting to analogies drawn from municipal law and general jurisprudence.

[2] See above, pp. 34-35.

[3] Such a distinction, however, does not prevent consideration being given to the historical fact that certain of the actual rights and duties possessed by nations were originally attributed to them on the basis of *a priori* assumptions.

[4] It is to the writings of publicists that the confusion is chiefly due. Foreign offices have as a rule been more concerned with maintaining rights than with classifying them in any particular way.

CHAP. VIII

the high seas is practically identified with that of external independence. Whether or not a particular right is or is not a fundamental right is a matter of theoretical jurisprudence rather than of positive law. All that can be stated definitely, in terms of general practice, is that nations do as a matter of fact regard certain rights as being of a more fundamental character than others, and that governments regard any encroachment upon them as a matter to be resisted by every means of redress which international law puts at their disposal.[1]

Secondary or derived rights

In addition to these fundamental rights general usage recognizes a variety of other rights which lack uniform definition and classification. Writers designate them by such terms as "secondary" or "derived rights," or "accidental," "relative," or "acquired rights." The practice of foreign offices appears to be content with simply not referring to them as fundamental. In general it may be said that these rights are those which are derived by one or more degrees from a fundamental right, and are therefore not so intimately connected with the latter as to make it impossible for a state to waive them without putting at issue its position in the international community. In some cases they appear to represent the application of a fundamental right to circumstances which raise a doubt as to the existence of a concrete right in the given instance.[2] Such, for example, might be the right of intervention by one state in the domestic affairs of another when believed by the former to be a necessary measure of self-defense and denied to be such by the latter. In other cases they represent rights whose objects are relatively unimportant, so that concessions may be made with regard to them, or violations of them submitted to, without raising any question of the legal personality of the state. Such, for example, might be the right of a state to regulate the internal discipline of foreign vessels in port, the right to demand specific measures of protection for citizens in foreign countries, the right of free passage through the maritime belt of foreign states, or the large body of rights acquired by treaties dealing with more or less transient interests.[3]

[1] A modern statement of the doctrine of fundamental rights may be found in Root's address upon the Declaration of the Rights and Duties of Nations, cited above. *Proceedings*, Am. Society of Int. Law, 1916, p. 1. The declaration itself follows the traditional classification.

[2] Westlake uses the term "imperfect" to designate such rights. *International Law*, 2nd ed., I, 301.

[3] A number of writers on international law mean by "secondary rights" those rights which are created by treaties or usages between two or more

In consequence of the difficulty of determining which rights are properly to be regarded as fundamental and which as secondary, many writers have discarded the two terms altogether, and have been satisfied with deriving all rights, without distinction, from the single comprehensive right of existence.[1] This attitude has the advantage of avoiding the technicalities of jurisprudence in a field of law as yet only partly developed. The argument for the retention of the distinction, at least as part of the scientific background of international law, is that nations do as a matter of fact draw a rough distinction between the two groups, and that the forms of redress resorted to in one case are as a rule more drastic than those resorted to in the other case. While international law has not as yet recognized any clear distinction between crime and tort, such as exists in municipal law,[2] it does distinguish between the methods of procedure proper when certain vital rights are violated and the more conciliatory procedure proper on other occasions. In consequence it would seem probable that the distinction between fundamental and secondary rights, under whatever designations, will continue in use by nations until such time as judicial agencies may be established having jurisdiction over all conflicts of claims without exception.[3]

Perfect and imperfect rights

A distinction, popularized by Vattel, between perfect and imperfect rights has likewise obtained a foothold in international law, though it is no longer so well recognized as formerly. "Perfect rights," said Vattel, "are those which carry with them the right of compelling fulfilment of the corresponding obligations; imperfect rights cannot so compel."[4] The former group included

states. See, for example, Bonfils, *Droit International*, § 237. This definition is more restricted than general use. The term "secondary rights" is sometimes used in general jurisprudence to describe "remedial rights" or "rights of redress." See below, p. 379. This use of the term has not yet found its way into international law.

[1] Oppenheim, for example, agrees with those who ask "that the fundamental rights of States should totally disappear from the treatises on the Law of Nations." (*International Law*, I, § 112.) It may be observed that some writers have gone to the further extent of denying that there is any distinction between one right and another; but this raises an issue as to the sanctions of the law rather than the character of rights.

[2] See below, p. 380.

[3] It should be noted that it is within the field of fundamental rights and their immediate derivatives that states are said to take "political" as distinct from legal action. Political action covers the arbitrary decisions of a state under circumstances not governed by concrete rules, so that each state must determine for itself what claims it may assert on the basis of the general principles of the law. Compare the distinction between justiciable and non-justiciable disputes, below, p. 407.

[4] *Droit des Gens* (Eng. trans.), introduction, § 17.

CHAP. VIII

the rights which belonged to nations by a clear inference from the law of nature, and which therefore created an absolute obligation upon the other party. In the case of the latter group, the inference from the law of nature was not so clear as to give rise to the right to compel performance. The theoretical basis of the distinction has now been abandoned, but its influence upon international law can still be seen in the correspondence of foreign offices where reference is made to certain policies or conduct of a state which if persisted in, would be regarded by the other party as "an unfriendly act," i.e., an act which would be met by the use of force if not desisted from.[1]

Rights not absolute but relative

In international law, as in municipal law, rights are not absolute but relative; that is to say, the right of one state must be exercised with due consideration for the exercise of a similar right on the part of other states. The secondary rights of one state must, in case of conflict, give way to the fundamental rights of another state; and at times where the fundamental rights of different states are in conflict, it may be necessary that one right yield temporarily to the more urgent exercise of another. The right of free intercourse may be denied in cases where the security of a state requires the establishment of a temporary quarantine or a permanent exclusion. The right of self-defense may justify, as in the case of the *Caroline*,[2] the temporary invasion of the territory of a neighboring state. For every right possessed by one state there is a correlative duty on the part of other states, which in turn restricts the free exercise of the rights of the latter. The belligerent right of blockade, for example, gives rise to a corresponding obligation on the part of neutrals, which restricts the normal right of the neutral to protect its citizens in their commercial activities. The adjustment of these conflicting rights and their correlative duties is, as has been seen, the primary function of international law.

The distinction between the substantive and the adjective law

In municipal jurisprudence a distinction is made between substantive law and adjective or precedural law. Substantive law, as shown above, is that larger part of the law defining the rights of the individual which the state stands ready to maintain.

[1] The distinction, when reduced to practical terms, differs little from that between fundamental and secondary rights. Publicists of the Austinian school of positive jurisprudence could not, however, fail to point out the logical inconsistency of an "imperfect right." Compare Westlake's use of the term "imperfect rights" with the distinction between fundamental and secondary rights given above. *International Law*, 2nd ed., I, 301.

[2] See below, pp. 143-144.

Adjective or procedural law is the body of rules providing the means or procedure by which the rights defined by the substantive law may be enforced by the aid of the state. The same distinction holds good in international law, although it is not generally recognized in the terminology of foreign offices. On the one hand there is the body of rights attributed to a sovereign and independent state as such, by virtue of which certain acts may be done or certain claims advanced with the support and sanction of the international community. On the other hand, if these rights should be violated, the international community recognizes a method of procedure for their enforcement, however inadequate it may be.[1] A number of modern writers have confined themselves to a distinction between the "law of peace" and the "law of war," the former embracing the substantive and the latter the adjective rules of international law. This classification, however, makes it necessary to treat peaceful methods of procedure either as an appendix to the law of peace or as a preamble to the law of war. It has had, moreover, the effect of attributing to the laws of war the importance of substantive rules of conduct.[2] It would appear that as a result of the World War greater emphasis is now being placed upon the substantive law as concerned with the normal relations of a state of peace; the rights recognized by that law are being more carefully analyzed, and the defects and gaps in the law are receiving greater attention. On the other hand, the procedure of war is being placed in sharper contrast with the alternative methods of peaceful procedure, and the term "law" as applied to the laws of war is being shown to have a distinctly different connotation from the term "law" as regulating the relations of peace.[3]

[1] The analogies between municipal law and international law are of the greatest constructive value in this connection. See below, Chap. XXII, a.

[2] This was generally the case with the older writers on international law in whose time the procedure of war met with less competition from the procedure of arbitration.

[3] See below, p. 429. The writer is indebted to Dr. J. B. Scott for valuable personal suggestions in this connection. See also, Scott, "The Evolution of a Permanent International Judiciary," in *Am. Journal,* VI (1912), 316-358.

CHAPTER IX

THE EQUALITY OF INTERNATIONAL PERSONS

a. Equality a characteristic of international persons

In no respect has the science of international law more signally failed to keep in touch with the facts of modern international life than in the principles and usages that have developed in connection with the status of international persons before the law. It is a fundamental principle of international law that states are legally equal. But as to the basis upon which this principle rests, the scope of its application, the inferences that may be drawn from it, and its practical consequences, there are few clear rules of law to be deduced from international practice and little agreement among publicists and writers.[1] Two primary aspects of the legal equality of states can, however, be distinguished. The one relates to the substance of the rights possessed by states, and is described in the statement that "all states have the same rights and the same obligations";[2] the other relates to the protection given by international law to those rights and is the equality referred to when it is said that "all states are equal before the law." By keeping these two aspects of equality separate, it becomes possible to discern somewhat clearly the essential features of the present international situation.

Fundamental rights

The principle of the sovereignty and independence of states which forms the basis of modern international law, while not inevitably necessitating, as it did not with Grotius,[3] an international community in which each state was the legal equal of every other, naturally led to that conclusion. Where no common superior

[1] The divergent views of modern publicists are presented at length in Dickinson, *The Equality of States in International Law*, Chap. IV.

[2] The author is using the phrase as it obtained acceptance in international practice and in the works of publicists generally. Professor Dickinson speaks of this form of equality as an "equal capacity for rights," denying that it means "that all have the same rights." (*Op. cit.*, 4.) The apparent contradiction between the two positions may, it is suggested, be resolved by observing the distinction between abstract and applied rights or between a right considered as a legal power to do a thing and a right as a legal claim over a particular object. See above, pp. 127-128.

[3] See Dickinson, *op. cit.*, Chap. II, where the frequently repeated statement that Grotius was responsible for the formulation of the equality of states as a principle of international law is shown to be unfounded.

was recognized, it followed that all were upon an equal footing. This inference, however, was as a matter of historical fact anticipated by theories of the natural law, by which rights held to belong to men in a state of nature were by analogy applied to nations, which were regarded as still in the state of nature from which individual men had emerged when states were formed.[1] But whether by deduction from a theoretical state of nature or by inference from the principle of sovereignty, since the end of the eighteenth century it has been an accepted principle of international law that all states have the same fundamental rights.[2] The right of existence is as sacred to one as to another. The right to determine domestic and foreign policies without interference, to exercise exclusive jurisdiction within fixed boundaries, to use freely the high seas, is the same for one and all. The terms upon which territory is acquired and held, the conditions upon which treaties are entered into, the binding force of such contracts, allow for no difference between state and state.[3]

Rights of redress

The rule that states are equal before the law implies that all states alike may, when they consider their rights violated, appeal to such redress as international law affords. In principle, the sanctions of international law hold good for the protection of the weak as well as of the strong. But here international law has proved itself unable to translate a principle of law into a concrete rule of conduct. In the absence of an international executive agency competent to bring physical pressure to bear to protect the rights of weak states, history has witnessed numerous cases of high-handed action on the part of strong states which have at times reduced the principle of equal rights to an empty formula. The violation of the neutrality of China during the Russo-Japanese War was passed over by international public opinion as being of relatively little consequence. Nor was any protection offered by international law to Korea in 1910 when that state was deprived of its very right of existence as an international person. Yet the equal protection of the law is that aspect of the

[1] The argument appears, for example, in Vattel, *Droit des Gens* (Eng. trans.), Introd., §§ 18-21.

[2] There are many who claim, as, for example, Hicks, in *Proceedings*, Am. Society of Int. Law, 1909, p. 246, that the equality of states is a mere "legal fiction"; but that assertion bears not so much upon the recognition of the general principle of equality as upon the reconciliation of that principle with certain concrete facts. See below, pp. 135-136.

[3] An exception is to be noted in the case of states having only qualified full membership in the family of nations. See above, p. 87.

CHAP. IX

equality of states which has most to commend it as a practical rule, and which, as is observed by a recent writer, is "essential to any legal system."[1]

Equal legal capacities and unequal physical capacities

The principle that states are legally equal both in respect to the possession of the same fundamental rights and in respect to the protection of those rights by international law goes side by side with an unquestioned inequality in respect to the physical limitations upon the operation of the principle. The distinction observable in municipal law, between a right considered as a legal power to act and the specific or concrete claims to particular material objects resulting from the exercise of that power, is applicable also to international law. Municipal law recognizes that persons of unequal physical and mental abilities have the same primary rights to the enjoyment of life, liberty, and property, notwithstanding the fact that in the one case the natural and inherent limitations of personal capacity may make the exercise of those rights far less significant in results than in the other.[2] So in international law states of varying size, strength, and resources are held to possess certain fundamental rights in common, in spite of manifest divergences in the objects over which those rights are exercised. Legal equality in international law, as in municipal law, is consistent with inequality in the actual sphere of control within which rights of the same nature are operative.[3]

Equality in respect to the adoption of new rules of law

Conceding these inequalities of physical capacity, the problem remains to determine how far the principle of equality operates in respect to the creation of new rules of law when these are called for by the changing conditions of international life. In the first place, there is no clearer application of the principle of equality than that no state is bound by a new rule of law unless it has expressly or impliedly assented to it. In the case of the *Antelope*[4]

[1] Dickinson, *op. cit.*, 4. It is the existence of implicitly accepted facts contradicting the formally acknowledged principle which has led certain writers to deny the validity of the legal rule. Whether such facts reduce the legal rule to a "mere fiction" must be determined by the number and seriousness of the violations of the law. Compare the question whether a domestic statute, violated on occasion with impunity, ceases to be "the law."

[2] Equality of opportunity, for example, is dependent, in respect to its substantial results, upon the physical capacity of the individual; liberty of contract is practically restricted by economic and social conditions.

[3] The test of legal equality would seem to be that no obstacle must be placed by the law to the exercise of the powers or faculties recognized by the law as belonging to all members of the community alike. Obstacles resulting from the physical incapacities of the individual are not regarded as incompatible with equality of legal status.

[4] 10 Wheaton, 66 (1825). Scott, *Cases*, 9.

Chief Justice Marshall held that the slave trade, being lawful at international law, could not be declared to be piracy by one nation so as to limit the rights of others. "No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another." A similar decision had been given some years earlier by the British High Court of Admiralty in the case of the French vessel *Le Louis*,[1] when Sir William Scott referred to the "perfect equality and entire independence of all distinct states" as being the great foundation of public law. Again, in the case of the *Scotia*[2] the court affirmed explicitly that "no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities."[3]

This right of an individual state to refuse its assent to new rules adopted even by a large majority of the international community was clearly recognized at the First and Second Hague Conferences, where individual states refrained from signing particular conventions, or signed with reservations, or omitted ratification after having signed.[4] It was accepted without question that obligations were to be assumed only to the precise extent to which each single state chose to go. The same rule, in even more explicit form, appears in the Covenant of the League of Nations.[5]

b. Primacy of the Great Powers

But the right of a state to refuse to be bound by rules of law to which it has not given its assent has not always been accompanied by a right to participate upon equal terms in the decision of questions affecting the general interests of the international community. Because of the inadequacy of the substantive rules of international law and of the absence of executive and judicial agencies of the international community as a whole, situations arose during the nineteenth century in which the leading powers of Europe undertook to settle concrete problems by meeting in groups apart and there taking decisions which had the force of law in the case before them. The Congress of Vienna in 1815

[1] 2 Dodson, 210 (1817). Scott, *Cases*, 338.

[2] 14 Wallace, 170 (1871). Evans, *Cases*, 5.

[3] It is important to note the context in which these dicta of the courts appear. They have been freely quoted as asserting an equality of nations under conditions not contemplated by the court.

[4] See above, pp. 64-65.

[5] See above, p. 48.

CHAP. IX

played the part of a supreme political authority in rearranging the map of Europe at the close of the Napoleonic régime. The Congress of Paris in 1856 exercised limited legislative functions in respect to new rules of war at sea. The Congresses of Berlin in 1878 and 1885 acted as *de facto* executive and judicial bodies in respect to the reconstruction of the Balkan states and the partition of Africa. The Conference of Algeciras in 1906 disposed of the problem of Morocco. The London Conference of Ambassadors intervened in the Balkan situation of 1913 and undertook the emancipation of Albania. In like manner the Conference at Paris in 1919[1] not merely imposed terms of peace upon Germany and her allies but adopted a number of rules affecting the interests of the international community as a whole.

Its legal effects

The primacy of the Great Powers, exercised under varying circumstances through more than a century, had in 1914 become, by force of established custom, an accepted fact of international relations. It had been exercised chiefly as a means of supplementing the deficiencies of international law in respect of legislative, executive, and judicial agencies. While the decisions taken at the several congresses and conferences were not binding upon third states,[2] it was practically inevitable that other members of the international community should give their implicit assent to them by reason of the power and prestige of the states which laid down the new rule or created the new political situation. Thus the Great Powers succeeded in forming a self-constituted governing body whose decrees had behind them a force adequate to secure their observance pending such time as the accomplished fact might come to be part of the established order of things.[3]

Procedure at the Hague Conferences

The calling of the Hague Peace Conferences of 1899 and 1907 brought the question of the equality of states into the foreground

[1] On this occasion a number of "Associated Powers" participated in the decisions, but their action was in most instances merely a formal ratification of the decision of the "Allied Powers." See C. G. Fenwick, "Organization and Procedure of the Peace Conference," in *Am. Political Science Rev.*, XIII (1919), 199.

[2] Other than those directly affected, which went through the formality of signing the treaty.

[3] Many writers, perhaps a majority of them, deny that the primacy of the Great Powers has any legal basis whatever, maintaining that it constitutes nothing more than a political inequality. But if international law be tested by facts rather than by theories, it would seem that some measure of legal validity must be accorded to a continuous and successful maintenance by the Great Powers of their paramount influence. See Lawrence, *Principles of International Law*, § 114; Dickinson, *op. cit.*, Chap. IV. The negative side of the case is presented by Professor Huber, of the University of Zürich, *Die Gleichheit der Staaten.*

of international controversy. Without questioning the right of each single state not to be bound by the action of the others, the leading powers at the conferences found themselves in the position of being unable to formulate new rules of conduct without taking into account the views of states whose interests they believed to be relatively inconsiderable. The principle of equality was strictly adhered to in the formal organization of the conferences. Each state enjoyed the right to be represented on the various commissions and subcommissions, and a rule was adopted that no convention should be recommended for adoption by the conference unless there was unanimity in the commission in favor of it.[1] The votes taken in plenary session proceeded in complete conformity with the formal equality of the powers represented. The result of this procedure was conspicuously manifested in the defeat of the project for the Judicial Arbitration Court, which, though favored in principle by practically all of the powers, failed of adoption by reason of the opposition of the smaller states to a court not constituted on the basis of the equality of all sovereign states.[2] Moreover, in consequence of the condition attached to certain of the conventions adopted, that they should be binding only upon the contracting states, and only if all the belligerents were parties to the convention, the failure of a small state to ratify a convention, as in the case of Serbia in 1914, had the effect of releasing the other belligerents from the obligation to observe the convention except in so far as it embodied existing customary law.[3]

Inequality in relation to administrative agencies

The principle of the equality of states had been to some extent formally departed from in the period before 1914 in the establishment of international administrative unions, such as the Universal Postal Union. Inequality of representation had been

[1] The leading powers succeeded, however, in obtaining control, through an appointed chairman of each committee, of the "committees of examination" in which much of the detailed work of the conference was done. Moreover, a rule of "quasi-unanimity" was followed in some instances, consisting in the abstention from voting of the power or powers opposed to the resolution when presented for the unanimous vote of the commission or of the plenary session. The opposition of one or more of the Great Powers was, however, sufficient, as in the case of the determination of the jurisdiction of the Permanent Court, to defeat a proposal. See J. B. Scott, *The Hague Peace Conferences*, 163.

[2] See below, p. 411. The difficulties encountered by the Great Powers at the Hague Conferences in legislating for the advancement of their predominant interests resulted in the limitation of the membership of the succeeding London Naval Conference to the states more immediately interested in the regulation of maritime warfare. See above, p. 29.

[3] See above, p. 65.

CHAP. IX

conceded by the smaller states to the extent either of admitting the dependencies of the larger powers to separate representation, or of conceding to the powers themselves a larger representation.[1] Unequal voting-power had been conceded on similar grounds, as well as on the ground of larger contributions to the support of the agencies of the union. These contributions were apportioned according to the population of the state or its interest in the object of the union. In some instances majority decisions might be taken. Thus precedents were created for the abandonment of the principle of equality in a field where its application, not less inapplicable than in the case of international legislative bodies, involved, however, merely the lesser interests of states.[2]

c. Organization of the League of Nations: inequality in the Council

In the organization of the League of Nations a compromise was effected by which the principle of equality was set aside in one branch of the governing body of the League and adhered to in the other.[3] The Covenant of the League recognizes in the composition of the Council the dominant position of the five Great Powers surviving the larger group of 1914.[4] No distinction, however, is made among these five, although in point of numbers, wealth, and extent of territory there are more marked divergences between the United States or Great Britain and Italy than between Italy and many of the lesser powers. In addition to these five the Covenant originally provided for the selection by the Assembly of four other members, the number of these latter being subsequently increased to six by vote of the Council in 1922.[5]

Equality in the Assembly

In the Assembly of the League the principle of equality is retained, each member being entitled to one vote and as many as three representatives.[6] Decisions of the Assembly, except in a

[1] For details, see Sayre, *Experiments in International Administration,* 162 ff.; Potter, *International Organization,* 287 ff.

[2] For the voting-power and pro-rata contributions of states to the administrative bureaus placed under the direction of the League of Nations, see *Répertoire des Organisations Internationales: Handbook of International Organizations,* Geneva, 1923.

[3] The student may compare the method followed by the convention at Philadelphia which framed the Constitution of the United States. A reconciliation between the larger and the smaller states was effected by creating an *upper* house on the basis of equality and a *lower* house on the basis of relative population, the arrangement being known as the "Connecticut Compromise." See Scott, *The United States: a Study in International Organization,* 179-187, citing Madison's *Notes of the Proceedings of the Federal Convention.*

[4] These include the United States, the British Empire, France, Italy, and Japan. (Art. 4, Covenant of the League of Nations.)

[5] The selected members of the Council include (November, 1923) Belgium, Brazil, Czechoslovakia, Spain, Sweden, and Uruguay, former members being Greece and China.

[6] Art. 3.

few cases specially provided for, require the agreement of all the members of the League represented at each meeting.[1] The expenses of the permanent secretariat are to be borne by the members of the League in accordance with the apportionment of the expenses of the bureau of the Universal Postal Union.[2] Amendments to the Covenant may be adopted by a majority of the Assembly, provided the majority include all the members of the Council; but no such amendments may bind members dissenting from them, in case of which dissent the said states shall cease to be members to the League.[3] It is worthy of note that the League solved the difficulty involved in the composition of an international court by providing that the Court of International Justice should consist of eleven members, to be nominated by the jurists of the Hague Tribunal (the so-called "Permanent Court of Arbitration") and elected, regardless of their nationality, by the Council and Assembly of the League.[4]

Jealous attitude of the smaller powers

The problem of bringing the principle of the equality of states into harmony with the facts of modern international life is one of the most difficult with which the community of nations has in recent years been confronted. At the meeting of the Hague Conference in 1899, and particularly at the meeting in 1907, the smaller states of Europe manifested extreme jealousy of the tendency of the Concert of the Great Powers to dominate the affairs of the Continent; and in this they were seconded by the Latin-American states, which appeared to find in the maintenance of a strict formal equality the necessary condition of their sovereignty and independence.[5] Distrust of the Great Powers led the smaller states to regard with suspicion any form of international government, however restricted.[6] Under the circumstances the possibility of recon-

[1] Art. 5. This provision would appear to preclude the possibility of effective decisions even more than the unanimity rule of the Second Hague Conference, which left it open to a power to refrain from voting in the commissions, and, by withholding signature from the convention, to refuse to assume an obligation without preventing others from assuming it. See above, p. 137.

[2] Art. 6. For the pro-rata basis, see Art. 27, Universal Postal Convention, 1906. This provision of the Covenant is pending amendment so as to permit the Assembly to decide upon the proportionate contributions to the budget.

[3] Art. 26. An amendment, pending ratification, requires that amendments be voted by a three-fourths majority of the Assembly, including the members of the Council, before being submitted for ratification.

[4] See below, p. 413.

[5] Compare, for example, the attitude of the Brazilian delegates, Barbosa, *Proceedings of the Hague Peace Conference*, 1907, Vol. II, Committee of Examination B, *passim*.

[6] The Judicial Arbitration Court, which was the particular object of attack, was to have no compulsory jurisdiction. Nevertheless, it was felt that a dan-

CHAP. IX

ciling national independence with a limited and delegated supernational authority seemed too remote to merit consideration.[1]

Claims of the Great Powers

On the other hand the Great Powers were unwilling to regard the smaller states as having interests commensurate with the equal voice they were claiming in the determination of future rules of law and in the establishment of new international institutions. The size alone of its population was regarded by the representative of a Great Power as entitling his state to a larger influence in the affairs of the international community. Moreover, there were, in addition, sharp differences of national ideals, political organization, material resources, and industrial development, which, it was held, gave rise to special interests demanding the protection of law.[2] If the Great Powers, their publicists argued, were to be denied an effective legal influence in the shaping of the future of international relations, it was inevitable that they would decline altogether to coöperate with the smaller states and would continue to take decisions within their limited group whenever occasions arose demanding prompt action.

Value of the League compromise

With the creation of the League of Nations, as has been seen, a reconciliation of the principle of equality with that of the primacy of the Great Powers was attempted; but the activities of the League have not as yet demonstrated whether the compromise effected by the Covenant will make it possible to secure coöperation for the benefit of the international community as a whole with due regard for the larger stake which certain states have by

gerous precedent might be created by it. The student may investigate the practical question whether the opposition of a number of the small states to proposals favored by the Great Powers was due to reactionary statesmanship or to fear lest an admittedly good object was being promoted by means tending to enhance the dominant control of the Great Powers.

[1] The international problem closely parallels the constitutional problem of federal government whether of the loosest or of the closest type. The delegation to a central government of power to regulate the interests of the group as a whole must be accompanied by guarantees that on the one hand the power so delegated will not be used to the advantage of the larger as against the smaller units of the federation and that on the other hand the central government will not be led to encroach upon the powers of local self-government reserved to the member states. If the records of remote or of recent history showed a greater tendency on the part of the strong to respect the rights of the weak, the reconciliation of federal and local government would obviously be a simpler matter. As it is, law *versus* liberty—union *versus* self-government—is the eternal conflict. Desirable as law may be in the abstract as an instrument of order and peace, the fear lest justice should suffer by the concrete rules adopted must necessarily delay their acceptance.

[2] In this respect the analogy between municipal law and international law is defective. The number of units subject to the former is so large that it is possible to strike a general average of capacity. The smaller number of members of the international community makes their inequalities harder to adjust.

reason of their population and industrial wealth. On the other hand the small states appear able, by their power of veto in the Assembly, to protect themselves against the adoption of measures encroaching upon those aspects of national sovereignty which have given force to the demand for equality. But as against the protection thus afforded there is the possibility that decisions of a large majority may be blocked by the obstructive attitude of individual states, whether these be large states seeking to protect their special interests or small states guarding their sovereignty, both, it may be, acting at the expense of the welfare of the community as a whole.[1] The executive functions intrusted to the Council, while making it possible for the Great Powers to take prompt action in emergencies, offer no opportunity for the progressive development of the substantive law. There remains, it would appear, the constructive problem of devising some modification of the organization which will permit a substantial majority to act for its own group without coercing the minority to be bound by its decision.[2]

[1] Compare, for example, the vote in the Assembly on September 25, 1923, on the amendment of Article 10 of the Covenant. The thirteen states which abstained from voting consisted for the most part of very small states. Persia was alone in casting a negative vote. The issue, however, in this case was not one of encroachment upon the small states by the large, but one of weakening the protection afforded by Article 10 to small states.

[2] Bare majority decisions, attended by a right of individual veto as respects the application of the law to a particular state, would obviously disrupt the association. On the other hand, majority rule binding upon all the members, as prevails in the United States Congress, is out of the question under present conditions. Unequal voting power would seem feasible, provided it be accompanied by the right of individual veto.

CHAPTER X

THE RIGHT OF EXISTENCE

a. Nature and scope of the right of existence

The right of existence, or of self-preservation, is recognized by international law as the primary right of states, being the necessary postulate of the possession of all other rights. Like the right of life in municipal jurisprudence, it is questioned only in respect to the inferential rights associated with it, primarily the right of self-defense against direct and indirect attack. In a larger sense the right of existence might be made to include both rights of independence and of territorial property, since these are essential to the due enjoyment of the right of life. Because, however, of the failure of international jurisprudence to adopt a logical analysis of the rights of states, and because of the corresponding absence of a uniform terminology in the diplomatic documents of foreign offices, clear exposition of the subject will be facilitated if the conventional classification of municipal jurisprudence be followed, thus leaving independence and territorial property to be treated as rights separate and distinct from the right of existence. The substance of international rights persists, under whatever designation the particular claim is made.

Theoretical and practical aspects

So sacred is the right of existence that the least deliberate infringement upon it by a state may be regarded by the injured state as a most serious offense. The invasion of a state's territory to the slightest extent, an affront committed against the diplomatic officers who represent its sovereignty, an insult to the flag which symbolizes its international personality, have been on occasion the cause of sharp diplomatic conflict or of open war. On the other hand the right of one state has been at times violated by the deliberate act of another state when emergencies have arisen presenting no other alternative for the preservation of the rights of the latter. In many instances these violations have their origin, on one side or the other, in the lack of control on the part of the states over certain elements of their citizen body which commit acts for which the state may not be held officially responsible, yet must under the emergency be held practically responsible.[1] The conflict

[1] The pursuit of Francisco Villa into Mexico by United States troops in 1916 is a case in point.

of international rights thus resulting is governed by a few general principles of law, which are, however, so vague as to leave it an open question in many cases whether the right of one has justified a breach of the right of the other. In consequence, by reason of the absence of an international authority competent to give effective sanction to international law, the right of existence on the part of small states has been at times precarious; and on occasion, as in the case of the partition of Poland, it has been no more than a legal fiction.[1] It must be said, therefore, that while the right of existence is possessed in principle equally by all states, its actual enjoyment is largely conditioned upon the physical power of the individual state. But this is a qualification which affects the secure enjoyment of the fundamental right of existence rather than the legal right itself. In principle the right is the same for one and all.

b. Self-defense against direct attack

International law clearly recognizes the right of self-defense against both direct and indirect attack.[2] Where the attack is direct, a state may not only stand upon the defensive on its own territory, but may invade the territory of the other state in order to prevent by anticipation the commission of an aggressive act by armed forces within the invaded state.[3] Two conditions must attend the exercise of this form of self-defense: first, that the necessity of self-defense should be of the very gravest character; and second, that the state whose territory is violated should be either unwilling or unable itself to prevent the commission of the threatened act. In 1817 the United States Government ordered a war-vessel to proceed to Amelia Island, then in Spanish territory, and expel a band of marauders who were committing depredations upon American commerce, and whom the Spanish Government appeared unwilling or unable to keep under control.[4] Again in 1837, during the progress of a rebellion in Canada, the Canadian Government, in order to anticipate an attack upon its territory by insurgents established upon an island in the Niagara River through which ran the boundary-line between Canada and the United

[1] Such would be the case in municipal law if murder were committed and the authorities of the state manifested open indifference.

[2] Westlake correctly distinguishes between the right of self-defense and the looser "right of self-preservation" advanced by Vattel and later by Rivier. *International Law*, 2nd ed., I, Chap. XIII.

[3] The fact that the invaded state in such a case recognizes no *duty* to acquiesce does not limit or qualify the legal right, provided the public opinion of the international community gives its approval.

[4] Moore, *Digest*, I, 42, 173.

CHAP. X

States, despatched a force across the river to a point on the American side from which the insurgents were obtaining supplies, and captured and destroyed a small boat, called the *Caroline,* killing two of the crew in the act.[1] In answer to the protest of the American Government against this invasion of its territory, Great Britain put forth in justification the imperative needs of self-defense, which required immediate action.[2] The plea of self-defense would doubtless have been accepted as justification for the seizure of the *Virginius* by a Spanish warship in 1873, had the detention of the vessel not been accompanied by the summary execution of the prisoners.[3] In 1916, following a raid upon American territory by Francisco Villa and a body of insurgents, a column of American troops was despatched in hot pursuit. General Huerta, the *de facto* president of Mexico, was notified of the act; but no pretense was made of awaiting his permission, on the ground that the very inability of Huerta to suppress the insurgents justified the action taken by the United States. After spending several months in an unsuccessful attempt to locate the bandits, the American troops were withdrawn.[4]

Self-defense in time of war

A different situation is presented when one state, engaged in war with another, violates the rights of a third state under alleged "military necessity," the latter plea being nothing more than the demands of self-defense, which assume a special urgency in view of the critical issues at stake in time of war. In 1807 the British Government, having reason to believe that France and Russia would coerce Denmark to join in the war, or that in any case Denmark would be unable to resist the seizure of its fleet by Napoleon, called upon Denmark to deliver up the fleet under a promise that it would be restored at the end of the war; and when Denmark refused to accede to this demand, the British Government undertook to shell the port of Copenhagen and seize the fleet.[5] The more serious step of the invasion of Korea by Japan during the war with Russia in 1904 to prevent its coming under the

[1] Moore, *Digest,* II, § 217.

[2] Webster's statement that the necessity of self-defense in such cases should be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation" has become historical, although doubtless not tenable in its literal form.

[3] For details of the case, see Moore, *Digest,* II, § 309.

[4] For a discussion of principles, see Hershey, "Incursions into Mexico and the Doctrine of Hot Pursuit," *Am. Journal,* XIII (1919), 557.

[5] The act has been variously commented upon by writers, some, as Hall and Westlake, excusing it, others condemning it, and again others finding extenuating circumstances. See Stowell, *Intervention in International Law,* 409 ff.

control of the enemy was justified by Japan on similar principles of self-defense.[1]

German invasion of Belgium in 1914

The violation of the neutrality of Belgium by Germany in 1914 furnishes an extreme instance of alleged self-defense. The act must be judged both by the obligations of the treaty of 1839 and by the provisions of general international law. The breach of the treaty of 1839 was without doubt the more serious offense, in that it involved a greater degree of bad faith, since the treaty had been entered into in anticipation of just such circumstances as induced the German Government to repudiate it. But independently of the treaty there was the customary law of neutrality, possessing, in addition to the authority of long usage, the formal sanction of the Hague Convention Relating to the Rights and Duties of Neutral Powers in War on Land.[2] As overruling both these forms of obligation Germany set forth the principle of necessity based upon the primary right of self-preservation.[3]

c. Self-defense against indirect attack

In respect to the right of self-defense against indirect, or more remotely threatened, attack, international law has not yet been developed beyond general principles. The abstract right of self-defense against all forms of attack is conceded, but it has not been reduced to a positive rule by a consistent line of precedents. The absence of an international court with jurisdiction over conflicting rights has left each nation the interpreter of its own necessity of self-defense in lesser as well as more vital matters; while the absence of an international executive body capable of protecting the rights recognized by the law has thrown each state upon

[1] The justification may be judged in the light of the subsequent fate of Korea.

[2] See below, p. 524.

[3] The statement of the chancellor, von Bethmann-Hollweg, has become historical. Speaking before the Reichstag on August 4, he said: "Gentlemen, we are now in a state of necessity, and necessity knows no law! Our troops have occupied Luxemburg, and perhaps are already on Belgian soil. Gentlemen, that is contrary to the dictates of international law. It is true that the French Government has declared at Brussels that France is willing to respect the neutrality of Belgium as long as her opponent respects it. We knew, however, that France stood ready for the invasion. France could wait, but we could not wait. A French movement upon our flank upon the lower Rhine might have been disastrous. So we were compelled to override the just protest of the Luxemburg and Belgian Governments. The wrong—I speak openly—that we are committing we will endeavor to make good as soon as our military goal has been reached. Anybody who is threatened, as we are threatened, and is fighting for his highest possessions, can have only one thought—how he is to hack his way through." Stowell, *Diplomacy of the War of 1914*, 445 n. 2. The justification offered must be weighed in the balance of general public morality rather than in that of strict law. For a discussion of the views of German publicists, see de Visscher, *Belgium's Case; A Juridical Inquiry.*

CHAP. X

its own resources, and has created a further necessity of protection against attack in its more remote forms.[1] This field of international relations, while having no parallel in the municipal law of the modern state, is analogous at certain points to municipal law in its earlier history.

Menace of armaments of neighboring states

The foremost question presented is to determine how far a nation may build up within and around itself military and naval defenses as a barrier against possible future attacks, and at what point a neighboring state is justified in regarding such armaments as constituting impending danger of attack. Defensive armaments have an equal value for offensive purposes, and it is obviously impossible for one state to take the word of its neighbor that elaborate preparations for self-defense contain no concealed intention of aggression. The problem is an old one. Grotius vigorously denounced the "intolerable doctrine of some writers, that by the law of nations we may rightly take arms against a power which is increasing, and may increase so as to be dangerous."[2] Equity, he held, was entirely opposed to the idea that the possibility of being attacked gives us the right to attack on our part; it was only when there was just ground of war on other counts that the growing strength of a rival might properly influence a decision to make war. Vattel rendered a similar decision upon the abstract question, with the even more ambiguous qualification that evidences of injustice or ambition on the part of a neighbor whose power is growing, indicated by the slightest wrong inflicted upon another state, were sufficient to justify anticipating his probable designs.[3] Such were the theories of the jurists. But in the meantime practical statesmen, as Vattel himself confessed, paid but little attention to their teachings, and confined themselves to the

[1] "It is well understood," said Senator Root in 1914, "that the exercise of the right of self-protection may and frequently does extend in its effect beyond the limits of the territorial jurisdiction of the state exercising it. The strongest example probably would be the mobilization of an army by another power immediately across the frontier. Every act done by the other Power may be within its own territory. Yet the country threatened by the state of facts is justified in protecting itself by immediate war. The most common exercise of the right of self-protection outside of a state's own territory and in time of peace is the interposition of objection to the occupation of territory, of points of strategic military or maritime advantage, or to indirect accomplishment of this effect by dynastic arrangement." The underlying principle is "the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself." *Am. Journal*, VIII (1914), 427.

[2] *De Jure Belli et Pacis* (Eng. trans.), Bk. II, Chap. I, § XVII.

[3] *Droit des Gens* (Eng. trans.), Bk. III, §§ 42-46.

formation of treaties of alliance and of guarantee and to the maintenance of the political equilibrium of Europe.

The balance of power

The doctrine of the necessity of a balance of power between the leading states as the basis of mutual self-protection dominated the international relations of the nineteenth century. The Congress of Vienna in 1815 rearranged the map of Europe with that object in view. The Crimean War was undertaken by Great Britain and France from a conviction that the protection of the Ottoman Empire within its existing boundaries was of vital importance for the maintenance of the balance of power among the states of Europe. The Congress of Berlin in 1878 felt the necessity of keeping the dying sultanate in existence as a check upon Russia. The culmination was reached in the delicately adjusted balance between the Triple Alliance of Germany, Austria-Hungary, and Italy, and the Dual Alliance of France and Russia, the latter subsequently enlarged into a Triple Entente by the qualified accession of Great Britain. Stripped of their trappings, these alliances were based upon the fundamental law of self-defense under a system of international relations in which each state was left to shift for itself, choose helpers where it could get them, watch with a suspicious eye the slightest rise and fall of the political balance, and be ready to strike, as Germany did in 1914, when it appeared prudent to prevent in advance a possible future disaster.[1]

The Covenant of the League of Nations introduced, as has been seen, a fundamentally different principle of mutual protection; and to the extent to which the League is able to give effect to its purposes it must radically modify the old principle of the balance of power. The Conference on the Limitation of Armaments, held at Washington in 1921-22, resulted in an agreement among the five Great Powers to reduce their naval armaments to definitely assigned ratios, thereby eliminating competition between them, without, however, adopting the principle of collective responsibility and coöperative action embodied in the Covenant of the League.[2]

The Monroe Doctrine

The right of self-defense against indirect menace of attack underlies the assertion of the Monroe Doctrine both in its original

[1] With the maintenance of the balance of power must be associated questions of dynastic succession, as in the veto put by France in 1870 upon the proposed succession of a Hohenzollern to the throne of Spain.

[2] For the text of the treaty, see *Am. Journal*, XVI (1922), Supp. 41.

CHAP. X

and in its derived forms. Sympathy with the struggle of the South American states for independence, as well as its own commercial interests, doubtless played a part in determining the stand taken by the United States. But more important in the mind of President Monroe and his advisers was the fact that the extension to the American hemisphere of the system represented by the Quadruple Alliance would be "dangerous to our peace and safety."[1] To the United States of 1823 its isolated geographical situation was an asset of the greatest value for national protection; so that it became a matter of urgent self-defense to forestall the reëstablishment upon the American continent of powers whose presence would entail for the United States the burden of defensive armaments and a possible entanglement in conflicting alliances. A similar motive of national self-defense was present in the demand for the withdrawal of French troops from Mexico in 1865, and in the interventions in Venezuela in 1902 and in Haiti in 1905, and particularly in the interdiction of a lease of Magdalena Bay by Mexico to Japan in 1912.

On the other hand, the original purpose of the Monroe Doctrine developed by a natural process of association into a doctrine of benevolent guardianship by the United States over the weaker states of the American continent. The intervention in behalf of Venezuela in 1895 was accompanied by an assertion that the "United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition."[2] The policy announced by President Wilson in 1913 in respect to domestic revolutions in Latin America and in respect to concessions of industrial rights to foreign nations bears the same character of friendly policemanship of the Western Hemisphere.[3]

Its semi-legal character

While publicists generally have asserted that the Monroe Doctrine is no more than a rule of American policy, it would appear that the doctrine has obtained at least a semi-legal character at international law. The continued acquiescence by the leading nations in the position assumed by the United States can fairly be regarded as implied consent. At the Hague Peace Conference of 1899, and again at the conference of 1907, the United States, without protest from other states, signed the first convention with

[1] For the text of that part of President Monroe's address to Congress, Dec. 3, 1823, in which the doctrine is stated, see Moore, *Digest*, VI, 401. For a history of the doctrine, see *ibid.*, VI, §§ 927-969.

[2] Moore, *Digest*, VI, 553.

[3] Statement of March 11, 1913; address at Mobile, Oct. 27, 1913.

a reservation reasserting its intention not to depart either from its policy of non-interference in the political affairs of foreign states or from its traditional attitude toward purely American questions.[1] While the negative policy of non-interference in European political affairs, which has been a regular accompaniment of the Monroe Doctrine, raises no question of conflicting international rights,[2] the positive features of the doctrine, the ban against territorial encroachment upon the Central and South American states, is a standing restriction upon the freedom of action of non-American states in dealing with them. The implied acceptance of this restriction would seem to give to the doctrine a limited legal character, without, however, obligating the United States to continue indefinitely to assert the claims now deferred to.[3]

The Monroe Doctrine and the Covenant of the League of Nations

The drafting of the Covenant of the League of Nations in 1919 raised the question of the effect of the obligations assumed under Articles 10-16 upon the Monroe Doctrine. On the one hand it was argued that the guarantees contained in the Covenant amounted to a world-wide adoption of the Monroe Doctrine, and that therefore there was no incompatibility between them and the doctrine. Against this position it was claimed that under the Covenant the United States would give up its right of individual action in circumstances calling for the application of the Monroe Doctrine, while European powers would acquire a joint right to take the collective action contemplated by the Covenant. In deference to these objections the draft Covenant was amended so as to provide that "nothing in this covenant shall be deemed to affect the validity of international engagements such as treaties of arbitration or regional understandings like the Monroe Doctrine for securing

[1] *Hague Conventions*, 234, 242.

[2] The policy of isolation, as a measure of self-protection, dates from Washington's farewell address of September 17, 1796. Its connection with the Monroe Doctrine is accidental rather than essential, so that occasional departures from it, as in the signature of the General Act of the Algeciras Conference of 1906, in no way weakened the assertion of the Monroe Doctrine. Compare, however, the alleged connection of the two policies, in the Senate debates attending the rejection of the Treaty of Versailles, 1919-20.

[3] In 1914 Senator Root stated that "the doctrine is not international law but it rests upon the right of self-protection and that right is recognized by international law." *Am. Journal*, VIII (1914), 427. Again, in 1923, Secretary Hughes asserted that the doctrine "is not a part of international law, maintained by the consent of civilized powers and alterable only at their will." *Am. Journal*, XVII (1923), 611. In both these cases, however, stress was being laid upon the fact that the Monroe Doctrine originated as a policy of self-defense and has continued to be maintained by the United States without assistance from other states. Such, however, has been the case with many rules of international law which, beginning as assertions of individual claims, have in time been acquiesced in by other states.

CHAP. X

the maintenance of peace."[1] Whether this article, conceding to the United States a privileged position in respect to questions affecting the American continent, can be reconciled with other provisions of the Covenant, Articles 10, 11, 16, cannot be determined so long as the United States remains outside the League. Taken in their literal terms the articles appear to be contradictory.

Parallel doctrines of other states

Parallels to the Monroe Doctrine may be found in the foreign policies of a number of the leading states. Thus, Great Britain has long considered it essential to the safety of the empire that the maritime passage to India by way of the Mediterranean and the Suez Canal be kept from coming at any point under the control of other powers. Again, France has felt it imperative of recent years that the communications with her colonies in North Africa be secured against interruption, particularly in time of war. Italy has manifested of late a desire to hold unrivaled control of the Adriatic. Japan entered upon her war with Russia upon grounds similar to those underlying the Monroe Doctrine; while in 1917 she secured from the United States by the Lansing-Ishii Agreement, since terminated, a recognition of her paramount interests in China.

d. Intervention: its legal basis

Precedents exist in which the right of self-defense against indirect attack has been made to justify interference by one state in the domestic affairs of another state, whether for the purpose of suppressing revolutionary movements which menace the security of the intervening state, or for the purpose of putting an end to conditions of misgovernment in the foreign state which disturb its own domestic peace. These precedents, however, have been too irregular and inconsistent to make it possible to infer from them a definite rule of law. Interference of this kind is technically known as *intervention,* and it is more commonly, but less logically, treated in its negative aspect, as an exception to the independence of the other state. Its true character, however, can be better judged by its positive aspect, as an act of alleged self-defense. Authors have disputed whether intervention is ever justifiable, being a direct violation of the independence of the state which is the object of it.[2] But while many of the interventions carried out during the nineteenth century were contested by third states as being contrary to the principles of international law, and

[1] The denial by certain publicists that the Monroe Doctrine is a "regional understanding" would not seem to affect the intention to exclude that doctrine from the terms of the Covenant, as provided.

[2] For references, see Hershey, *Essentials of International Law,* 154 n. 18.

may well have been deserving of moral censure, other interventions were undoubtedly acquiesced in, and were the logical consequence of an international system lacking executive agencies for the protection of rights. That intervention is justified on no other ground than that of self-defense would seem, however, to be an accepted principle, though apparently of little value in that general form.

Intervention directed against revolutionary governments

Intervention to overthrow revolutionary governments, or to prevent the spread of revolutionary principles, has shown new forms under changing conditions. In defense of their own monarchical claims Austria and Prussia intervened to check the progress of the French Revolution in 1793. The Congress of Vienna in 1815 boldly reorganized the domestic governments of France, Spain and Portugal in the interest of a stable and conservative régime. In 1820 the Quadruple Alliance undertook to excommunicate from the family of nations "states which have undergone a change of government due to revolution, the results of which threaten other states"; and pledged themselves, if immediate danger threatened, to have recourse, if necessary, to arms "to bring back the guilty state into the bosom of the Great [Holy] Alliance."[1] On the basis of this principle Austria intervened to suppress uprisings in Italy in 1821, France intervened for a similar purpose in Spain in 1823, and plans were made to assist the Spanish Government in recovering its rebellious colonies. Again, in 1849, the Austrian Government obtained aid from Russia to assist it in suppressing the revolt in Hungary. With the growth, however, of stable democratic governments, and with the practically universal adoption of constitutional limitations upon monarchical control in the second half of the nineteenth century, the occasions for such interventions largely disappeared.

Cases of Germany and Russia in 1918

A unique reversal of conditions was witnessed when, upon the entrance of the United States into the World War, President Wilson demanded that the German people introduce some measure of parliamentary control over their government as a condition of the discussion of terms of peace.[2] It was only after an assurance from the German Government that it could now speak in the name of the German people that the negotiations leading to the armistice were concluded. In contrast with this demand by the Allies for the elimination of the elements of absolutism in the German

[1] Protocol adopted at Troppau.

[2] Reply to Pope Benedict, August 27, 1917; address to Congress, December 4, 1917.

CHAP. X

Government was the subsequent attitude of the Great Powers toward the Bolshevik Government of Russia. First by means of military intervention following upon the defection of Russia from the ranks of the Allies, and later by means of an economic blockade, the attempt was made to bring about the fall of a government which had proclaimed its intention of spreading its revolutionary principles throughout the world, and which was held to be disturbing by its paid agents the domestic peace of other nations.[1]

The removal of an international nuisance

Intervention with the object of protecting the state against conditions of continued misgovernment in a neighboring state is strikingly illustrated in the declaration of war by the United States against Spain in 1898. International law has never explicitly recognized a right on the part of states similar to the common-law right of an individual to abate a nuisance. At the same time, in the absence of an international tribunal of compulsory jurisdiction, it has not been possible for a nation to sue out a writ of injunction against a foreign state. In the judgment of the United States Government the condition of chronic rebellion in Cuba, accompanied by military repression of a particularly odious character, as well as by the failure to establish proper sanitary measures against the spread of yellow fever, constituted a continuous disturbance to the peace of the United States.[2] Whether war was the only available remedy was a question of public morality, not of positive law. The particular method of self-protection to be adopted under the circumstances was left by international law to the discretion of the injured party.

Case of Austria-Hungary and Serbia in 1914

The right of self-defense against misgovernment in a neighboring state was presented in acute form in the ultimatum of Austria-Hungary to Serbia on July 23, 1914. Overlooking the peremptory character of the ultimatum, which was without precedent in modern diplomacy, and leaving out of account the moral issue involved in the refusal of Austria-Hungary to submit to arbitration the points upon which Serbia refused to yield, the strictly legal aspects of the situation were as follows: The Dual Monarchy was a recognized person of international law and as such was entitled to maintain its territorial integrity, however unjustifiable its composite structure of dominant and subject races

[1] The earlier active intervention of Great Britain, France, and the United States must be distinguished from their later passive attitude of refusal to recognize the *de facto* Bolshevik Government.

[2] See address of President McKinley to Congress, April 11, 1898. Moore, *Digest,* VI, § 909.

was. It had therefore a legal right to defend itself against what it believed to be the attempt of agencies in Serbia to spread propaganda with the object of fomenting revolution in the Slavic districts of the state. That Serbia had on its part every reason to view with satisfaction the creation of disaffection in these districts, seeing that their inhabitants were powerless to assert at international law a right of self-determination, did not detract from the legal rights of Austria-Hungary. International law of 1914, lacking authoritative judicial and executive agencies, was simply inadequate to meet a situation in which the legal rights of one state conflicted with the equitable claims of another.

Self-defense against international outlawry

International law recognizes a right of self-defense on the part of the nations collectively or individually against the menace of lawless conduct perpetrated by one state against another. In such cases the principle is generally accepted that a serious violation of international law will, if permitted to pass unpunished, have the effect of undermining all law and reduce the whole international system to anarchy.[1] The coalition formed against Napoleon in 1805, when it appeared that the rights of neighboring states were being ruthlessly crushed underfoot, received the sanction of public opinion throughout Europe. The intervention of the United States in Mexico in 1865 would have been legally justifiable as a means of thwarting the illegal intervention of France, even had the United States had no traditional Monroe Doctrine to support its action. So also, in 1914, the violation by Germany of the neutrality of Belgium would have offered legal grounds for intervention by Great Britain and other powers, even had they not been parties to the treaty of 1839. The fact that in such cases there was a conflict of rights between the state seeking to maintain the integrity of international law and the state asserting the necessity of overriding it in urgent self-defense [2] does not imply that neither party could claim legal validity for its action, but merely that international law had no authoritative agencies to decide which right should prevail. International law in these instances, as in others, recognized certain general principles, but had no means of passing upon the application of the principles to concrete situations.

[1] Vattel correctly stated the principle "that all nations may put down by force the open violation of the laws of the society which nature has established among them, or any direct attacks upon its welfare." *Droit des Gens* (Eng. trans.), Introd., § 22.

[2] See above, p. 143.

CHAP. X

Intervention on "grounds of humanity"

A more uncertain application of the right of self-defense is to be seen in the interventions that have from time to time taken place upon what are called "grounds of humanity." The phrase is not a scientific one, and it refers, it would seem, to those general principles of conduct which are held particularly sacred by all nations. The question is presented, What international right on the part of third states can arise in consequence of the brutal and inhuman conduct of a state toward its own citizens? Interventions of this character on the part of the Great Powers collectively were witnessed on a number of occasions during the nineteenth century, as, for example, in 1827, when Turkish methods of suppressing the rebellion in Greece shocked the conscience of Europe, or again in 1860 to protect the Christians of Mount Lebanon, or in 1878 to secure the deliverance of the Balkan states, or in 1891-96 following massacres in Armenia and Crete. The fact that these interventions were supported by public opinion among the leading nations stamped the action of the Great Powers as legally valid, whatever be the general principle of law to which it can be referred.

Its legal basis

Since international law is only a law between states as such,[1] collective intervention "in the interest of humanity" might be interpreted as summary punishment inflicted upon a state which has disgraced the society of nations by its misconduct. Hall offers as a ground of intervention that such acts "are so inconsistent with the character of a moral being as to constitute a public scandal,"[2] giving rise to a right of intervention based upon the conditions upon which a state has been admitted as a member of the international community. Another explanation might be that a state has the right to protect the moral feelings of its people as well as their material interests, when injured by the acts of another state. The bond of a common race, as between Russia and Bulgaria in 1877, or of a common religion, as between the Christian states of Europe and their brethren in Turkey, gave rise to acute sympathy, with corresponding mental suffering, when reports of the massacres were received. Obviously this right of intervention is particularly susceptible to abuse, and is in urgent need of more specific definition by international statutory legislation.[3]

[1] See above, p. 85. [2] *Op. cit.*, § 92.

[3] It is worthy of note that the guarantees given by the states recently admitted into the family of nations, looking to the protection of racial minorities within their national boundaries, promise to remove in large part the grounds for interventions of the above character. See above, p. 91; H. Rosting, "Pro-

To the same general principle must be referred such minor diplomatic interventions and official expressions of opinion as are exemplified in the refusal of the United States to renew the commercial treaty with Russia, upon its expiration in 1913, pending assurances from that Government of fairer treatment of its Jewish population;[1] or, again, the resolution adopted by both Senate and House of Representatives of the United States in 1919 expressing sympathy with the desire of the Irish people for a government of their own choice.[2]

Defense of national honor

In defense of its right of existence a nation may resent and demand redress for insults to its national honor. This inferential right is described by some authors as the "right to respect,"[3] and it is classed as a fundamental right because of the serious consequences that have at times followed the violation of it. It is a right to demand respect for the personality of the state as such, independently of the particular governmental agencies that may happen to represent it at the time. This respect is shown by a body of ceremonial observances reciprocally followed, such as honoring the flag of the state when officially flown, conforming to the etiquette of diplomatic correspondence, and conceding special privileges to diplomatic representatives and public vessels of the state. The reason why a disregard of these observances, and especially the manifestation of an open contempt for the dignity of the state as expressed through them, is regarded as a matter of such grave importance is the fact that an affront against the honor of the state would seem to imply an attack upon the very position of the state within the international community, a questioning of its sovereignty, a manifestation of hostility against the state's very existence. In all such cases the sharpest resentment has regularly been shown by the offended state.

The Tampico incident

In the great majority of instances insults offered to the dignity or national honor of a foreign state are not the deliberate act of

tection of Minorities by the League of Nations," *Am. Journal*, XVII (1923), 641.

[1] See *Am. Journal*, VI (1912), 186.

[2] It was freely asserted by publicists at the time that the Irish question was a "domestic problem" which Great Britain should be left free to handle in its own way. But it may be questioned whether, in view of international precedents, any problem can in point of law be considered as purely "domestic" when as a matter of fact the methods resorted to for its solution actually disturb the domestic peace of another country. Whether such interventions are morally justified by the particular circumstances is a point outside the sphere of positive international law, each nation in such cases being the judge of its own rights.

[3] E.g., Hershey, *op. cit.*, 157.

CHAP. X

the government of the state, but rather the result of individual or mob violence beyond the power of the state to control, or they are the result of unauthorized acts on the part of subordinate officers of the state.[1] An instance of redress demanded for insults to the national flag is to be seen in the Tampico incident between the United States and Mexico in 1914. After President Wilson had advocated a policy of patient waiting pending the restoration of stable political conditions in Mexico, he suddenly reversed his attitude in consequence of the temporary arrest of an American officer and crew in Tampico, and appeared before Congress to ask its approval of drastic measures to be taken to demand redress for the insult offered to the American flag under whose protection the whale-boat had tied up at the wharf.[2] Congress thereupon acceded to the request of the President that he be permitted to "use the armed forces of the United States in such ways and to such an extent as may be necessary to obtain from General Huerta and his adherents the fullest recognition of the rights and dignity of the United States."[3]

e. The protection of citizens in foreign countries

A further inferential right that may be regarded as an extension of the right of self-protection is the right of a state to protect its citizens when temporarily present, or when permanently resident, in a foreign country. In the absence of an international court, having jurisdiction over individuals similar to that possessed by the United States Supreme Court over suits between citizens of different States of the Union, or over suits brought by an individual under the federal law, the nations have come to identify to a limited extent the interests of their citizens abroad with their own national interests. Though the ground for this identification would appear as a matter of fact to be more sentimental than real, since it cannot be said that as a practical issue the existence of the state is in any real sense involved in the injustice that may be shown by foreign governments to its individual citizens, nevertheless as a point of law the state is regarded as having a very clear right to see that no injustice is done to members of its citizen body in other countries; and serious crises have at times arisen over relatively minor incidents.

[1] For the distinction to be made between acts for which a state is directly responsible and acts for which it can be held only indirectly responsible, see below, Chap. XXIII.

[2] The position taken by the President is summarized in his address before Congress, April 20, 1914. *Congressional Record*, Vol. 51, 6908.

[3] Resolution approved April 22, 1914.

Extent of protection that may be demanded

Once certain leading principles have been laid down, however, no part of international law is subject to more uncertainties than this. As a general rule a state may demand for its citizens in foreign countries protection of person and of property, in accordance with the laws of the particular foreign state. The full measure of the rights which the foreign state may decide to permit aliens to enjoy is for itself to determine;[1] but the recognition of certain fundamental rights of person and of property is implied in the fact of the admission of aliens into the country. If an injury is done to the alien in respect to these rights he must first seek redress in the courts of the foreign state, where he will, in the assumption of the law, obtain the same justice that would be meted out to the citizens themselves. Only in cases where the laws of the foreign state are not justly administered, or where they are discriminatory in character, or in certain instances where the substance of the law is flagrantly oppressive, may the state take up the claim of its citizen as a matter of immediate consequence to itself.[2] The question then becomes no longer a domestic issue between the injured alien and the foreign government, but a public issue between the two foreign offices.

The circumstances under which a state may take up the claim of its citizens are so far lacking in definiteness, and precedents are so irregular and conflicting, that beyond the acceptance of certain general principles international law has few specific rules to offer. The United States Department of State has issued from time to time a "Claims Circular" giving instructions to persons seeking the interposition of the department in the enforcement of their claims against a foreign state, and stating the conditions under which the Government will undertake to intervene in their behalf.[3] In a number of cases the United States has intervened in behalf of its citizens before the latter have exhausted the remedies offered by the local courts. These cases have generally arisen in connection with backward countries, whose judicial systems have been considered defective, or whose executive acts have not been subject to review by the courts.[4] In the recent case of the arrest and prosecution by the Mexican courts of Mr. W. O. Jenkins,

[1] See below, p. 178.

[2] For a discussion of the standard which must be maintained by the judicial system of a state, see Hyde, *International Law*, I, §§ 266-267.

[3] See circular of January 30, 1920; Senate Document No. 67, 66th Congress, 1st sess.

[4] For illustrations, see Moore, *Digest*, VI, §§ 988-989.

CHAP. X

consular agent at Puebla, in November, 1919, on the charge of perjury in a judicial declaration, the Department of State immediately intervened on the ground that the prosecution was but a means of evading responsibility for the acts of bandits who had seized Mr. Jenkins and held him for ransom. The Mexican Government challenged the propriety of the intervention of the United States pending a trial according to Mexican law; but upon further pressure from the State Department the Mexican court first released the prisoner on bail and later dismissed the charges against him.[1]

Cases of mob violence

The extent to which a state may demand redress for injuries inflicted upon its citizens in foreign states when such injuries are the result of mob violence cannot be determined by any strict rule of law. It is agreed that in such cases a demand may be made that the foreign state use "due diligence" to maintain law and order, whether by precautionary measures or by due punishment of the offenders. A failure on the part of the foreign state in this respect warrants the interposition of the state of which the injured person is a citizen. This holds good even though the injured alien has suffered no greater loss from the outbreak than other citizens of the offending state. Further, intervention would appear to be legally justified when the alien resident has been the victim of mob violence in consequence of his particular nationality, so that the attack upon him may be regarded as an attack upon his state. Apart from these two situations, the practice of states has not been uniform. The Great Powers have generally been ready to exercise a fuller right of intervention in respect to backward states than they have acknowledged on the part of others in respect to their own territories. While the United States has on the whole been insistent upon the protection of its citizens in China, Turkey, and the Central and South American states, it has been reluctant to view with the same degree of seriousness injuries inflicted upon aliens resident in the United States. In several instances, such as on the occasion of the riots at New Orleans and at Key West in 1851,[2] the massacre of Chinese at Rock Springs, Wyoming, in 1885,[3] and the Mafia riots at New Orleans in 1891,[4] the executive department refused to admit a liability to make compensation, although Congress proceeded to grant the same as a matter of grace. In the case of the Boxer riots in China in 1901,

[1] For details of the case, see Hyde, *op. cit.*, I, § 286.
[2] See Moore, *Digest*, VI, § 1023.
[3] *Ibid.*, § 1025.
[4] *Ibid.*, § 1026.

during which the rioters laid siege to the foreign legations in Peking and killed a number of Europeans, the Great Powers intervened, and, after sending military detachments to the rescue of the legations, demanded a heavy indemnity from China.[1]

Injuries received during civil war

It is equally unsettled as a point of law how far a state has the right to intervene in favor of its citizens who are injured as a result of civil war in a foreign country. The general principle appears to be accepted that a state may not intervene to demand of the foreign government special protection for its citizens when that government is for the time being powerless to control the acts of the insurgents. The insurrection is treated, from the point of view of a right of intervention by third states, as on a par with the situation of public war. Aliens in such cases must share the fate of citizens of the foreign state itself; having identified themselves with the citizens of the foreign state, they must abide by the misfortunes as well as share the benefits of their temporary allegiance.[2] Here again, however, the weaker and more unstable states, particularly those of Central and South America, have been the object of special interventions. On account of the frequency of insurrections in those states, the stronger states have not been willing to regard such insurrections as on a par with regular civil war, and they have pressed their claims at times to the point of forcible intervention. In answer to this policy Señor Calvo put forth in 1887 [3] the principle, now known as the Calvo Doctrine, that neither armed nor diplomatic intervention is justified as a means of enforcing the claims of citizens in foreign countries on account of losses sustained in time of civil war or armed insurrection. While the doctrine has received general approval of the South American states, it cannot be said to have obtained as yet the status of a rule of law.[4]

Cases involving contract rights

Special difficulty has arisen in connection with the intervention of states to protect the rights of their citizens acquired as the result of contracts entered into with foreign governments. In principle there might seem to be no distinction between property losses arising from mob violence and civil war and property losses caused by the failure of a foreign government to meet its bonded debts, except that in the latter circumstance the government is directly

[1] See Moore, *Digest*, V, §§ 808-810.
[2] *Ibid.*, VI, § 1032.
[3] *Droit International*, III, §§ 1271-1297.
[4] For a discussion of the doctrine, see A. S. Hershey, "The Calvo and Drago Doctrines," *Am. Journal*, I (1907), 26.

CHAP. X

responsible for obligations which it has itself assumed, whereas in the former the government is only indirectly responsible. Nevertheless, states have been, on the whole, reluctant to intervene in support of claims of their citizens arising out of monetary transactions with foreign states. This attitude would appear to be based partly on the consideration that persons entering into such contracts do so with a knowledge of the risks involved, and with expectation of correspondingly large returns upon their investment, and partly upon the ground that a state whose citizens engage in such ventures on a large scale would find its relations with foreign states embarrassed by the numerous appeals made to it by citizens to intervene on their behalf.

In 1902, at the time of the blockade of Venezuela by the combined fleets of Great Britain, Germany, and Italy, with the object of enforcing contractual and other claims against Venezuela, Dr. Drago, foreign minister of the Argentine Republic, formulated the doctrine, now known by his name, that "a public debt cannot give rise to the right of intervention, and much less to the occupation of the soil of any American nation by any European power."[1] The Drago Doctrine was thus advanced by its author as supplementary to the Monroe Doctrine. International attention was directed to the question during the next few years, with the result that the subject was taken up at the Second Hague Conference and a convention, known by the name of the United States delegate, General Porter, was adopted in which the contracting powers agreed "not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals." The agreement, however, was made subject to the condition that the debtor state should not refuse to reply to an offer of arbitration or, having accepted it, fail to abide by the award.[2]

Intervention in connection with the Monroe Doctrine

The peculiar interest of the United States in respect to the question of the forcible collection of contract debts arises from the complications of that question with the Monroe Doctrine. In 1902 President Roosevelt acquiesced in the blockade of Venezuela by Great Britain, Germany, and Italy, undertaken in the interest of the contractual claims of their citizens, only after receiving as-

[1] In a note to the Argentine minister at Washington. Moore, *Digest*, VI, 592.

[2] The convention was signed with numerous reservations, entered principally by the Latin-American states. See *Hague Conventions*, 242 ff.; Higgins, *Hague Peace Conferences*, 191 ff.

surances that no occupation of territory was contemplated.[1] In 1905 he was confronted with a similar situation in Santo Domingo. Seeing the republic embarrassed by its foreign debts, and in danger of having its ports occupied by the governments of its creditors, he concluded a treaty with it by which the United States agreed to undertake the adjustment of outstanding Dominican debts, domestic as well as foreign, and with that object to take charge of and administer the custom-houses.[2] The proposed treaty was rejected by the Senate; but in 1907 a new treaty was negotiated providing for the issue of new bonds and the appointment by the President of the United States of a receiver-general of customs.[3] In the message accompanying the earlier treaty, President Roosevelt explained the situation as presenting the alternative of the adoption of effective measures by the United States to see to the payment of the foreign debts of the republic, or its acquiescence in the measures taken by foreign governments to safeguard the interests of their citizens, the latter choice implying the abandonment of the traditional policy of the Monroe Doctrine.[4]

General nature of intervention

It is frequently stated that intervention of a forcible character, to which the term is more properly restricted, is not "a law or a right in the ordinary legal sense of these terms,"[5] but is a political act, a summary procedure above the law, an exercise of sovereignty. This view, however, is correct only in so far as it relates to the concrete situations which have arisen as a result of the attempt of one nation to put into effect a general principle of law which another nation concedes in the abstract but denies to be applicable under the circumstances. It thus happens that, in the absence of an international tribunal competent to pass upon the application of general principles to concrete cases, the plaintiff state will assert a right without a corresponding recognition on the part of the defendant state of a duty to acquiesce in that right. Owing to the complex character of international relations, and to the presence in the same act of intervention of legal rights and questionable ulterior designs, it is next to impossible to draw clear

[1] See above, p. 148.

[2] See Hollander, "The Convention of 1907 between the United States and the Dominican Republic," *Am. Journal*, I (1907), 287.

[3] For the text of the treaty, see Malloy, *Treaties*, I, 418.

[4] *Congressional Record*, Vol. 40, Part I, p. 7. For further details, see Moore, *Principles of American Diplomacy*, 261-265.

[5] Hershey, *Essentials of International Law*, 155; Wilson and Tucker, *International Law*, § 42; Oppenheim, *International Law*, I, § 129.

CHAP. X

inferences from the variety of precedents which mark the history of the nineteenth and twentieth centuries. In this field of the law, more perhaps than in any other, the lack of international judicial institutions of compulsory jurisdiction has resulted in creating a chaotic condition of conflicting claims, while the consequent uncertainty in respect to so fundamental a matter has had the effect, in turn, of making resort to judicial tribunals all the more precarious. This is the situation underlying the refusal of nations to submit "questions involving vital interests" to arbitration.[1] Its solution must await the development of constructive rules of statutory law, accompanied by the establishment of an international executive agency.[2]

[1] See below, p. 407.

[2] It should be observed that the wide scope of the international right of self-defense, including resistance to indirect as well as direct attack, is due to the absence of a collective responsibility on the part of the community of nations as a whole for the protection of its individual members. See above, p. 40. For the same reason it is impossible to draw any practicable distinction between offensive and defensive wars. Under the existing system of individual self-defense, attack must be anticipated before it has become too formidable to resist.

CHAPTER XI

THE RIGHT OF INDEPENDENCE: JURISDICTION OVER PERSONS

a. Nature of the right of independence

The right of independence or of liberty of action or, as it is more generally called, of "sovereignty," is by the traditions of international law a fundamental right, in that the international system which has prevailed since 1648 has been based upon it as an essential postulate. But although a fundamental right, it is subject to numerous restrictions and limitations, which are the result of the conflicts of international claims and the necessary adjustment of the rights of one state to those of another. In the theory of the law the right of self-preservation on the part of one state may, under certain circumstances, take precedence of the right of independence on the part of another. What these circumstances are has been described in the preceding chapter; but the fact must be again adverted to that in these cases the state whose independence is temporarily encroached upon by the act of another usually does not acknowledge a duty to acquiesce in the act. What gives such encroachments a legal character, if indeed they can be said to have such,[1] is the fact that public opinion of the nations at large may sanction them, although the particular state which is the victim of them does not. Other restrictions upon the independence of a state are the result of treaties voluntarily entered into or of concessions and privileges granted by custom to the public ministers, vessels of war, and merchant ships of foreign countries. These have, for the most part, a clear and definite legal character.

Distinction between external and internal independence

The right of independence has two distinct aspects, one relating to the freedom of the state in respect to the management of its domestic affairs, the other relating to the freedom of the state in respect to its position in the world of nations. The former is known as the "internal independence" or "internal sovereignty" of the state, and it involves the supreme jurisdiction of the state to control all persons and property within the boundaries of its territorial domain; the latter is known as the "external indepen-

[1] See above, pp. 150-151.

CHAP. XI

dence'' or ''external sovereignty'' of the state, and it connotes the supreme power possessed by the state to determine the nature of the relations which it will maintain with other states. Internal independence makes the state a free agent in dealing with its own citizens and its own territorial property; external independence makes the state a free agent in dealing with other states. The term ''sovereignty,'' while in common use, is open to the objection that, because of the historical associations connected with it, it has been used at times by nations to assert a complete freedom from control, which is both inconsistent with the principle of law between nations and in reality contradicted on many points by the facts of international life.[1]

The scope of internal independence

The general principle that a state has jurisdiction over all persons and property within its territorial borders creates a legal presumption that what the state does within its domains is justified in default of the most urgent claims of other states that their own right of self-protection is thereby impaired.[2] Thus a state may organize its government in any manner which is most satisfactory to it; it may change from a monarchial system to a republican system and vice versa, as its own judgment may dictate; it may regulate the personal and property rights of its citizens as it believes to be best for the general welfare; it may concede liberal privileges to aliens in its midst, or it may restrict their privileges narrowly or even refuse them admission to the country altogether. At the same time, however, all these rights are subject to the condition, intangible and difficult of strict definition, that they may not be exercised in such a way as to menace the security or disturb the domestic peace of other states. In consequence, a state may not maintain military or naval forces in such evident excess of the requirements of self-defense as to suggest aggressive designs,[3] nor may it persecute a section of its people to a degree which arouses the indignation of the people of another state,[4] nor

[1] See above, p. 44. When, for example, in 1895, in relation to the Venezuela boundary controversy, Secretary Olney announced that ''the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition,'' the statement was either incorrect or to be understood as not impairing the general rights of other states at international law.

[2] See above, p. 150.

[3] See above, p. 146.

[4] See above, p. 154. In addition there are the restrictions imposed upon certain states by conventions providing for the protection of racial and religious minorities. Above p. 91. Compare the advisory opinion of the Permanent Court of International Justice on September 10, 1923, upon questions submitted to the Court by the Council of the League of Nations in respect to the property rights of settlers of German origin residing in the territory ceded

may it discriminate unfairly against aliens whom it has admitted into its midst.[1] This necessary adjustment of the right of independence of one state to the right of self-protection possessed by other states is, as has been seen, a judicial function for which no provision has as yet been made by the society of nations. The jurisdiction of existing international courts does not extend to it.[2]

b. Jurisdiction over citizens: the determination of citizenship

One of the primary problems connected with the internal independence of a state is that of determining the membership of its citizen body. The question is a purely municipal one in so far as it merely involves the right of the state to say that particular persons shall be identified with its corporate personality and shall, in consequence, be permitted to enjoy the rights of citizenship and be obligated to perform corresponding duties. The international problem arises when the state undertakes to give protection to, and demand allegiance of, certain persons as its citizens, when similar and conflicting claims are made by other states. In such cases there exists a dual claim upon the citizen, and he is held to have a dual or double nationality. The term "nationality" expresses in international law, not the racial group to which an individual belongs, but the bond which unites him to a given state, or his membership in such state.[3]

Citizenship by birth

The law is well established that persons are citizens if born on the soil of a state and of parents who are themselves citizens of the state. This general rule covers, in most states, the large majority of the citizen body. Apart from this general rule, the practice of nations varies widely. Great Britain, the United States, and a number of Latin-American states adhere primarily to the principle of *jus soli*, by which mere birth upon the soil is sufficient to confer nationality, irrespective of the citizenship of the parents.[4]

to Poland by Germany. Above, p. 122, n. 3. See also the advisory opinion rendered by the Court on September 15, 1923, on questions arising out of Art. 4 of the Polish Minorities Treaty of June 28, 1919. *Advisory Opinions*, Series B, No. 7.

[1] See above, p. 157.

[2] See below, pp. 408 ff.

[3] The term "national" has come into use of recent years in place of "citizen" or "subject" to avoid the necessity of distinguishing between citizens and others who are members of the body politic without possessing the full rights of citizens. In the United States, however, since the adoption of the Fourteenth Amendment citizenship and nationality coincide.

[4] The Fourteenth Amendment of the United States Constitution proclaims that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." Prior to the Civil Rights Act of 1866, which preceded the adoption of the amendment, the American federal courts followed the principle as a rule of the common law.

The above provision of the Fourteenth Amendment was interpreted in the

CHAP. XI

This principle was of feudal origin, and it originally prevailed in France and other continental countries, which, however, in time abandoned it. By contrast with the *jus soli* France (since the adoption of the Code Napoléon), Germany, Austria-Hungary, and other states adhere primarily to the civil law principle of *jus sanguinis*, by which the nationality of children follows that of their parents, irrespective of their place of birth. In the one case the basis of jurisdiction is the *locus* and in the other case the *persona*. It follows, therefore, that a conflict of jurisdiction may arise whenever a child is born on the soil of one state of parents who are citizens of another state. For example, a child born in the United States of French parents is an American citizen *jure soli*, but the child is at the same time a French citizen *jure sanguinis*. His effective citizenship will then depend upon the jurisdiction to which he is subject. In the United States he is an American; in France, a Frenchman; in any other country he is both.[1]

Claims based upon both principles

Few states, however, abide strictly by one system or the other. Great Britain, before 1870, not only claimed the allegiance of the children born to aliens on the soil of the country, but that of children born to British citizens resident in other countries. The former claim has, since the Naturalization Act of 1870, been qualified to permit the children born of alien parents on the soil of the country to assume the nationality of their parents by a declaration of alienage made upon attaining majority. The United States in like manner has supported its claims *jure soli* by claims *jure sanguinis*. By a law of Congress, enacted in 1855,[2] all children born out of the jurisdiction of the United States, whose fathers were at the time of the children's birth citizens of the United States, were declared to be citizens of the United States; but the rights of citizenship were held not to descend to children whose fathers never resided in the United States. A more recent law of 1907 [3] restricts the act of 1855 by providing that such

case of United States *v.* Wong Kim Ark, 169 U. S., 649 (1898), to confer citizenship upon the child of alien parents who were not themselves eligible to citizenship by naturalization, as being of Chinese descent. In commenting, *obiter*, upon the general principle of citizenship, the court said: "It is the inherent right of every independent nation to determine for itself, and according to its own Constitution and laws, what classes of persons shall be entitled to its citizenship."

[1] See below, p. 175.

[2] Act of February 10, 1855; incorporated in *Revised Statutes*, § 1993.

[3] Act of March 2, 1907. 34 *Stat. at Large*, 1229.

foreign-born children who continue to reside abroad must, in order to receive the protection of the United States, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States, and must take the oath of allegiance to the United States upon attaining majority.[1] In France while the *jus sanguinis* constitutes the primary claim of allegiance, elements of the *jus soli* are to be found in the provision that persons born in France of alien parents, and domiciled in France at the time of attaining majority, shall be considered French.[2] Such children, if not domiciled in France upon attaining majority, may declare their intention to acquire a French domicile, and may claim French nationality by actually acquiring a French domicile within a year after the declaration. On the other hand, on attaining majority the native-born child of foreign parents may decline French nationality by means of an attestation showing that he has claimed the nationality of his parents. The various conflicts resulting from the simultaneous presence of these secondary and primary claims of allegiance are generally settled as a practical matter by the deference of the former to the latter, when the state asserting its primary claim of allegiance has at the same time *de facto* jurisdiction over the individual in question.

Dual nationality and military service

Several cases of dual nationality, with resulting conflict of national claims, were presented to the Department of State before the entrance of the United States into the World War. In the case of Frank Ghiloni the Department of State requested that the Italian Government release from compulsory military service a man born in the United States in 1885, whose father was at that time an Italian subject. Ghiloni had resided seventeen years in the United States before going to Italy in June, 1914, and it was held by the Department of State that such continued residence

[1] The object of this provision was, however, rather to put the Department of State in the position of being able to refuse to protect those who failed to comply with it than to assert a right on the part of the United States to protect those who should comply with it as against the possible claims of allegiance made by the state of their birth and residence. See Hyde, *International Law*, I, 65, n. 2.

[2] *Civil Code*, 1804, § 9. Compare the facts involved in the recent dispute between Great Britain and France as to the effect of the Tunisian and French nationality decrees of November 8, 1921. See the advisory opinion of the Permanent Court of International Justice, February 7, 1923. *Advisory Opinions*, Series B, No. 4. See M. O. Hudson, "The Second Year of the Permanent Court of International Justice," *Am. Journal*, XVIII (1924), 2; C. N. Gregory, "An Important Decision by the Permanent Court of International Justice," *ibid.*, XVII (1923), 298.

CHAP. XI

indicated that Ghiloni, although born with dual nationality, had elected American nationality. The Italian Government, however, refused to recognize the prior claim of the United States, although a third party, Austria-Hungary, on capturing Ghiloni in battle, acknowledged the justice of the claim and released the prisoner.[1] In the case of Ugo Da Prato, a native-born citizen who went to Italy in 1912 to study architecture, the father, a native of Italy, had been naturalized in the United States before the birth of his son; so that it did not appear to the Department of State that the son could be considered an Italian subject under Italian law. A request was, therefore, made for his immediate release from detention for military service.[2] In the case of P. A. Le Long, the Department of State was presented with an inquiry whether a person born in the United States of a native French father who had emigrated to the United States at twenty years of age, could be held liable for military service in case he should visit France during the progress of the war. In reply the Department of State, after citing the provisions of the French Civil Code, explained the legal status of Le Long as being one of dual nationality, and informed him that it could not therefore give him "any assurance that you would not be held liable for the performance of military service in France should you voluntarily place yourself within French jurisdiction."[3]

Citizenship by naturalization

In addition to nationality based upon birth, international law recognizes a nationality acquired by voluntary act, in accordance with which a person, born a citizen of one state, obtains the status of an adopted citizen of another state. The procedure by which such new nationality is acquired is known as "naturalization," and it is a matter regulated by each state according to its own conception of the degree to which its national interests will be promoted by extending its citizenship to outsiders. In the United States the present procedure of naturalization, as provided by act of June 29, 1906, requires two distinct steps in the acquisition of citizenship. First, there must be a "declaration of intention" to become a citizen. This declaration, made under oath, expresses the *bona fide* intention of the applicant to become a citizen of the United States and to renounce his allegiance to any foreign state, naming the state of which he is at that time a citizen. The

[1] *Am. White Book, European War,* III, 373-387.
[2] *Ibid.,* II, 149.
[3] *New York Times,* September 12, 1915.

second step consists in filing a petition, verified by affidavits of witnesses, setting forth that the applicant is not opposed to organized government and is not a believer in polygamy, and that it is his intention to renounce his foreign allegiance and to reside permanently in the United States, and that he will support the Constitution of the United States.[1] The declaration of intention may be made at any time after the arrival of the alien in the United States; but two years must intervene between the declaration and the final admission to citizenship. Since there is a further requirement of five years' residence in the United States, it is immaterial, in point of the time of actual admission to citizenship, at what time within the first three years of residence the applicant takes out his "first papers." Naturalization is limited by law to "white persons" and "persons of African descent"; and it has been held by the courts that the former term excludes Chinese, Japanese, and other persons of the brown and yellow races.[2]

Conflicts of national claims: indelible allegiance

The conflicts of national allegiance resulting from the respective claims over a particular person advanced on the one hand by the state of his birth or of his parentage, and on the other hand by the state of his adoption by naturalization, have been equally serious and much more frequent than the conflicts of allegiance arising from the dual claims based upon birth. During the early decades of its national life, the United States, following the doctrines of nationality held by Great Britain,[3] maintained through its courts the doctrine of "indelible allegiance." *Nemo potest exuere patriam.* Born a citizen of United States, no one might transfer his allegiance to another state without the consent of the state which had first claim upon him. In Williams's Case,[4] decided in 1797, the defendant had been born in the United States and had, as he offered to prove, become naturalized in France in the year 1792, after which he accepted a commission in the French

[1] For further minor details, see the text of the law, 34 *Stat. at Large,* 596. For temporary amendments adopted during the World War, see Acts of May 9, 1918, and August 31, 1918, 40 *Stat. at Large,* 545, 955.

[2] Act of February 18, 1875, amending Acts of 1802 and 1804. For the decisions of the courts, see Moore, *Digest,* III, § 383; Van Dyne, *Naturalization,* Chap. I. The question with respect to the admission of Japanese to naturalization was finally decided in the negative in the case of Ozawa *v.* United States, 260 U. S., 178 (1922). See *Am. Journal,* XVII (1923), 151, 328.

[3] See MacDonald's Case, Foster's Crown Law, 59 (1747), in which the court instructed the jury that, if the prisoner should be found to have been born in Great Britain, his long residence in France and his French commission should not constitute a defense to a charge of high treason for participation in war against his native country. Scott, *Cases,* 134.

[4] U. S. Circ. Ct. Dist. Conn., 1797. Scott, *Cases,* 158.

CHAP. XI

navy. Upon the subsequent arrest of the defendant in the United States upon a charge of violating the Neutrality Act of 1794, it was held by the United States District Court that Williams had no power to renounce his allegiance without the consent of the United States,[1] so that he was still subject to the law of the United States and might properly be punished for an offense committed against it.[2] It should be observed that the protests entered by the United States against the practice of British public vessels in searching American vessels on the high seas and impressing into the service of the British navy naturalized Americans of British birth, were not based, e.g., by Jefferson in 1793, on the ground that naturalization in the United States released persons from the obligations due to the country of their birth, but on the ground that vessels flying the American flag might not be searched for other purposes than the enforcement of the laws of contraband and blockade.[3]

The "right" of expatriation

But while the judicial department of the United States Government was asserting the doctrines of the common law, the executive department found it necessary to take a stand in favor of the right of a state to protect its naturalized citizens against the claims of the country of their native allegiance. The growing tide of immigration to the United States from Europe raised in an acute form the question how far the American Government might protect its naturalized citizens upon their return to the country of their birth. The factor of compulsory military service in the states of continental Europe entered in to complicate the situation. In 1845 Secretary Buchanan asserted the principle that the act of naturalization dissolved any former tie of allegiance; but in 1848 Secretary Webster refused to protect a naturalized citizen, Knoche by name, who had been forced to enter the Prussian army upon his subsequent return to that country, holding that the "native domicile and national character" of Knoche reverted upon his return to the country of his birth.[4] A similar decision was rendered in 1852 in the case of a naturalized citizen, Depierre, who had returned to France, the country of his birth.[5] But in

[1] An interesting application was made by the court of the contract theory of civil society, in accordance with which "one of the parties to this compact cannot dissolve it by his own act."

[2] The same position was reaffirmed in subsequent cases, e.g., Shanks *v.* Dupont, 3 Peters, 242 [1830], until a new rule of statutory law was adopted. Compare, however, the early attitude of Virginia by act of 1779. Scott, *Cases*, 154.

[3] See below, p. 511.

[4] Moore, *Digest*, III, 564.

[5] *Ibid.*, 567.

1859, when Buchanan was President, a new policy was adopted. In the case of Christian Ernst[1] the Department of State insisted that a naturalized foreigner who returns to his native country "returns as an American citizen and in no other character," and that he might be protected by his adopted country against any attempt on the part of the country of his birth to punish him for an offense, such as the evasion of military service, not committed before his emigration to the United States.

The Bancroft treaties

In consequence of popular agitation brought on by the refusal of Great Britain to constitute mixed juries for the trial of naturalized American citizens implicated in the Fenian rebellion of 1867, Congress passed the act of July 27, 1868, which declared that "the right of expatriation is a natural and inherent right of all people," and that in consequence all naturalized citizens, being *ipso facto* absolved from their former allegiance, should receive in foreign countries the same protection of person and property that was accorded to native-born citizens.[2] This unilateral pronouncement, while competent to dictate the duties of the Department of State and the rule of decision in the federal courts, was obviously unable to introduce a general rule of international law. Where alleged "natural and inherent" rights run counter to established practice the latter must be taken to be the rule of law until an agreement is reached upon a new rule. The act stood, therefore, merely as a declaration of American policy, considerably in advance of the views held by the states of continental Europe. It was followed in 1868 by the conclusion with the North German Confederation and other German states of a group of treaties, known as the Bancroft Treaties, in which reciprocal recognition of naturalization was provided for when accompanied by an uninterrupted residence of five years. Similar treaties with Belgium, Sweden and Norway, Austria-Hungary, and other countries followed shortly after.[3]

At the present day the great majority of states accept the fact of the naturalization of one of their citizens in a foreign country as an automatic release of the citizen from his former allegiance. In most treaties, however, it is provided that a naturalized citizen returning to the country of his birth may still be held liable for an offense "punishable by the laws of his original country and

[1] Moore, *Digest*, III, 573.
[2] 15 *Stat. at Large*, 223; *Rev. Stat.* §§ 1999-2001.
[3] For the texts of the treaties, see Malloy, *Treaties*, I, 45, 80; II, 1298, 1758.

CHAP. XI

committed before emigration."[1] The evasion of military service is presumably included among such offenses, although liability for such an act may cease through the operation of a statute of limitations of the original country. France still refuses reciprocal recognition of naturalization until its emigrant citizen shall have rendered the specified grades of military service or shall have reached an age at which he is no longer held liable for such service.[2] Russia, under the old régime, denied to its citizens the right of expatriation and asserted the right to punish them, if they returned to their native jurisdiction, for the offense of becoming naturalized abroad without their Government's consent.[3]

Loss of citizenship

By an act of 1907 the United States provides not only for the automatic expatriation of a citizen by the fact of his naturalization in a foreign state, but also for the presumptive loss of American citizenship in the case of a naturalized citizen who resides for two years in the state from which he came or for five years in any other state, unless steps are taken by such person to show that he wishes to retain his citizenship.[4] British nationality, under the act of 1870, may be lost by naturalization in a foreign country or by "declaration of alienage."[5] Other states, as a rule, provide for similar loss of citizenship by naturalization abroad, with special provision, in certain cases, for loss of citizenship by reason of mere residence abroad, and in other cases for loss of citizenship by the act of emigration. A few states do not regard the naturalization of their citizens in foreign countries as necessarily cancelling their former allegiance. Switzerland requires a formal renunciation of allegiance, to be made in Switzerland as prescribed by law.[6] By a law which went into effect January 1, 1914, Imperial Germany permitted citizens to retain their German citizenship, with the object apparently of facilitating the repatriation of those who returned to their native country.[7] Spain requires the knowl-

[1] Article II, treaty with North German Union.

[2] Moore, *Digest*, III, 599.

[3] *Ibid.*, 652.

[4] Act of March 2, 1907, § 2. 34 *Stat. at Large*, 1228. Compare the provisions of the Pan-American treaty of 1906, by which citizenship acquired by naturalization is lost by residence in the country of birth for more than two years. *Am. Journal*, VII (1913), Supp., 226.

[5] For the text of the act (§§ 4, 5, 6), see Scott, *Cases*, 157. The act was superseded by the act of August 7, 1914. *Am. Journal*, IX (1915), Supp., 413.

[6] Moore, *Digest*, III, § 456.

[7] During the war between the United States and Germany it was unofficially charged in the American press that the object of this law was to permit Germany to retain, for sinister purposes, a measure of control over her citizens who had been naturalized abroad. But in view of the fact that other states held

edge and consent of the Government as a prerequisite to loss of citizenship, in the absence of which the citizen is regarded as still bound by his obligations to his native country.[1] Some states, such as Italy and Japan, formally recognize the fact of a citizen's becoming naturalized abroad, but continue to hold him subject to the obligations of military service.[2]

Status of married women

By the common law of Great Britain and the United States the marriage of a woman citizen to an alien did not operate to dissolve her native allegiance. In the case of Shanks *v.* Dupont [3] it was held that an American woman who had married a British officer in 1781 and had moved to England in 1782 had not lost her citizenship by the fact of her marriage, although she had lost it by removal to Great Britain under the terms of the treaty of 1783.[4] This rule of the common law was modified by Great Britain in 1844 and again in 1870.[5] In the United States an act of Congress of 1855 followed the British law of 1844 in conferring citizenship upon an alien woman who should marry a citizen of the United States, but it remained unsettled whether by marriage to an alien an American woman lost her nationality.[6] In 1907 an act of Congress [7] provided on the one hand that "any American woman who marries a foreigner shall take the nationality of her husband," and on the other hand that such woman should resume her American citizenship upon the termination of the marriage relation, either by mere residence in the United States or by reg-

to the same practice, the inference from the policy of Germany was not conclusive. For the text of the German law (Sec. 13, 25) see Scott, *Cases*, 157, n. 11. For the full text, see *Am. Journal*, VIII (1914), 217-227. For an analysis of the act, see *ibid.*, 477-486.

[1] Moore, *Digest*, III, § 455. For a survey of the legislation of foreign countries, see *ibid.*, §§ 441-465; Van Dyne, *Treatise on the Law of Naturalization in the United States.*

[2] For the rare cases of "stateless" persons who have lost their original nationality, or were born without one, and have not acquired nationality by naturalization, see Oppenheim, *International Law*, I, §§ 311, 312. Also, Scott, *Cases*, 167.

[3] 3 Peters, 242 (1830).

[4] In reaching its conclusion on the first point the court relied upon the doctrine of "indelible allegiance." "Marriage with an alien, whether a friend or an enemy," said the court, "produces no dissolution of the native allegiance of the wife. It may change her civil rights but it does not affect her political rights or privileges. The general doctrine is, that no persons can, by any act of their own, without the consent of the government, put off their allegiance and become aliens."

[5] First with respect to the marriage of an alien woman to a citizen and later with respect to the marriage of a British woman to an alien.

[6] See Van Dyne, *Citizenship of the United States*, § 55. Moore, *Digest*, III, § 408.

[7] 34 *Stat. at Large*, 1228. *U. S. Comp. Stat.*, 1918, § 3960.

CHAP. XI

istration at a United States consulate.[1] The position thus taken by Great Britain and the United States had long been held by the majority of continental and Latin-American countries, the latter apparently influenced by the Code Napoléon.

The Cable Act

The act of Congress known as the Cable Act, approved September 22, 1922, marks a departure from both the late policy of the United States and the general practice of other states.[2] Adopted, it would appear, with the object of regulating the admission of women to suffrage by putting married women upon a footing independent of their husbands, it provides (a) that a woman shall not acquire citizenship by marriage to a citizen of the United States or by the naturalization of her husband, but, if eligible to citizenship, must be personally naturalized under the conditions prescribed; (b) that a woman citizen of the United States shall not cease to be a citizen by reason of marriage unless she makes a formal renunciation of citizenship, or unless she marries an alien ineligible to citizenship. Women who have lost their citizenship by reason of marriage prior to the passage of the act may acquire citizenship by naturalization, unless their husbands are ineligible. Apart from the advisability of the new law as a domestic question, it would appear that the isolated action of the United States in the matter will entail serious hardship to married women who are denied citizenship by American law and at the same time lose the citizenship of their native country. Further, when American women married to alien husbands reside abroad problems of dual nationality will arise until such time as the provision of the law of 1907 will operate to expatriate them.[3]

Status of children

Minor children, while retaining the nationality of their birth *jure soli*, generally acquire the new nationality of their parents when the latter become naturalized abroad. In the United States the acquisition of citizenship by minor children is dependent upon permanent residence in the country, if begun during minority.[4]

[1] The constitutionality of the law was upheld in Mackensie *v.* Hare, 239 U. S., 299 (1915), where the court referred to the identity of husband and wife as "an ancient principle of our jurisprudence" and as having "purpose, if not necessity, in purely domestic policy" and "greater purpose and, it may be, necessity, in international policy." For the same case before the Supreme Court of California, see Scott, *Cases*, 161.

[2] *Stat. at Large*, 67th Congress, Vol. 42, No. 346. See also *Am. Journal*, XVII (1923), 52.

[3] Numerous complications in the administration of the law have already arisen, principally in consequence of immigration restrictions and passport regulations.

[4] Law of March 2, 1907, § 5. For the provisions and interpretation of earlier laws, see Moore, *Digest*, III, § 413.

Double allegiance: a problem of international reconstruction

The inconvenience and friction attending the conflicting claims of states in respect to their native-born and naturalized subjects present a forcible argument for the conclusion of a general international convention reducing the divergent policies to a uniform rule. One of the chief difficulties in the way of such an agreement in the past has been the obligation of military service exacted by the states of continental Europe, both in respect to the period of compulsory training and in respect to the duty of the citizen to respond to the call of the mother-country in time of war. The conflict between allegiance based upon *jus soli* and allegiance based upon *jus sanguinis* might yield fairly easily to a common agreement; that between allegiance based upon birth and allegiance based upon naturalization is more complicated. Even were the contention of the United States generally accepted, that naturalization in one country automatically dissolves the bond of allegiance to another country, there still remains the international right of every state as territorial sovereign to deny to its citizens the right under domestic law to emigrate from the country except under prescribed conditions, and the consequent right of the state to punish such persons, upon their return to their native jurisdiction, for an offense committed while subject to its jurisdiction.[1]

c. Jurisdiction over aliens

The obligation of a state to afford protection to the lives and property of aliens within its jurisdiction exists by inference from the right of other states to demand such protection as an incident to their right of national self-protection.[2] Beyond that obligation each state is left free to determine its own policies with respect to both the admission of aliens into its jurisdiction and the special privileges which it may concede to them when once admitted. It must be noted, however, first, that general principles governing the right of a state over aliens within its jurisdiction do not always correspond with customary practice, and secondly, that while states may be free to adopt their own individual policies concerning the status to be accorded aliens, they are not free to discriminate in favor of the nationals of one state as against those of another except upon urgent grounds, the validity of which is not at present determined by any general rule.

The admission of aliens

By inference from the sovereignty of states it is a well established general principle that a state may forbid the entrance of

[1] The prospect of a willingness on the part of certain states to abandon such indirect control over their citizens is apparently closely connected with the problems of disarmament and the abandonment of compulsory military service.

[2] See above, p. 156.

CHAP. XI

aliens into its territory, or admit them only in such cases as commend themselves to its judgment.[1] The right of total exclusion is, however, more theoretical than real. As a practical issue, no state can be assumed to be desirous of cutting itself off from all intercourse with the outside world; and should it do so it might reasonably be held to have forfeited its position as a member of the international community. When it is asserted by publicists that there is a legal "right of intercourse" as between states, all that can be meant, consistent with the law, is that by custom some degree of commercial and social intercourse has come to be regarded as a normal condition of modern international life. This is quite a different matter from an obligation on the part of a particular state to admit all or any of those who only come with the intention of becoming permanent residents. The partial exclusion of alien immigrants by the United States[2] has been acquiesced in by other states without question as to the legal rights of the United States in the matter. Total exclusion of immigrants may at any time become a necessity for those states of the Western hemisphere which feel that the number of immigrants to their territories has exceeded the capacity for beneficial assimilation. Under such circumstances there would seem to be no doubt that the general principle of the right of exclusion might be given practical application without giving rise to legal grounds of protest from other states.

Discrimination against particular countries

The present issue, however, is rather one in which discrimination is shown against the citizens of particular states. Partial exclusion, such as is put into effect by the United States law of May 19, 1921,[3] being directed against the citizens of all states indiscriminately,[4] presents no international issue. Likewise the exclusion of certain types of immigrants, such as idiots and paupers,

[1] The rule was stated clearly by Vattel in 1758, *Droit des Gens* (Eng. trans.), Bk. II, §§ 94, 100. The dictum in the case of Nashimura Ekiu *v.* United States, 142 U. S., 651 (1892), is often quoted: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

[2] See below.

[3] For the earlier laws, see Moore, *Digest*, IV, § 562. The act of June 5, 1920, excludes designated groups of whatever national origin; the act of May 19, 1921, restricts immigration according to quotas based upon past immigration. The latter act has now been superseded by the act of May 26, 1924.

[4] The degree of discrimination resulting from the application of an equal law to unequal conditions, namely, the relative disparity between the numbers admitted from the several countries before and after the passage of the law, does not present a ground of legal complaint.

when put into effect impartially, remains a purely domestic question. The United States, however, has undertaken by successive acts of Congress, beginning in 1882, wholly to exclude Chinese immigrants,[1] as well as the natives of other specified sections of the continent of Asia.[2] By a treaty of 1880[3] China had agreed to the regulation or temporary suspension by the United States of Chinese immigration, but it was not until 1894 that China, by treaty, acquiesced in the absolute prohibition of the entrance of Chinese laborers into the United States for a period of ten years from the ratification of the treaty. At the expiration of the ten year period the United States continued its policy of exclusion without considering it necessary to have the support of treaty sanction, and the several acts passed by Congress would doubtless have been more vigorously contested had China been in a position to do so effectively. Agitation in the United States for the exclusion of Japanese immigrants resulted in the conclusion in 1907 of the Root-Takahira Agreement, by which Japan undertook itself to prevent the immigration of Japanese laborers to the United States.[4] The delicate question whether the United States had a right to discriminate against the citizens of a particular state was thus settled in the case of Japan by conclusion of a "gentleman's agreement" which contemplated the removal of the occasion for the obnoxious legislation.[5] It should be observed that in both these cases the right of entry into the United States which the two states might have claimed for their citizens was merely an inferential right following from the principle of the equality of states. To exclude all aliens impartially raises no issue of discrimination; the exclusion of the citizens of a particular state denies to that state a right accorded to others. International law has as yet developed no formal rule by which the circumstances of a particular case can be shown to justify discrimination without raising an inference derogatory to the principle of equality.[6]

[1] For the provisions of the several Acts, see *Treaty, Laws, and Rules Governing the Admission of Chinese*, Department of Labor, Bureau of Immigration, 1917.

[2] Act of February 5, 1917; 39 *Stat. at Large*, 875.

[3] Malloy, *Treaties*, I, 237.

[4] *Ibid.*, I, 241.

[5] It is interesting to note that while the subsequent treaty of February 22, 1911, contained no reference to restrictions upon Japanese immigration, the signature of the Japanese ambassador was accompanied by a declaration of intention to observe the earlier agreement. Charles, *Treaties*, 82.

[6] The distinction between *inferiority* and *difference* has obvious practical application, although difficult of legal formulation. See statement of Secretary Bryan, July 16, 1913, *Am. Journal*, VIII (1914), 573.

CHAP. XI

The expulsion of aliens

The right of a state to expel aliens from its territories for reasons bearing upon the public welfare of the state is well established; but in the exercise of this right there must be, as in the case of the admission of aliens, no discrimination against the citizens of a particular foreign state as such. It would appear that the foreign government has a right to inquire into the reason for the expulsion of its citizen.[1] Precedents exist, chiefly in the relations between the Great Powers and small and unstable states, showing the exaction by foreign governments of an indemnity for the arbitrary expulsion of their subjects. Great Britain obtained from Nicaragua in 1865 an indemnity for the expulsion of twelve British subjects who had been arrested and expelled for alleged participation in the Mosquito rebellion. In the same Bluefields Case the United States, relying chiefly upon the treaty of 1867, demanded that the two American prisoners be informed of the charges against them and of the evidence in support of the charges, admitting, however, the right of Nicaragua to expel them if the charges were true.[2] In 1888 the United States demanded an indemnity of Guatemala for the expulsion by executive decree, before the completion of judicial process, of an American citizen, Hollander, who had been arrested on a charge of malicious libel and forgery.[3] A recent instance of the exercise of the right of expulsion is to be seen in the action of the United States in 1920 in deporting to Russia, on the ship *Buford*, a group of anarchists and radical socialists who had emigrated from that country to the United States and whose activities on behalf of their political principles were considered detrimental to the welfare of the United States.[4]

Rights conceded to resident aliens

By international law, as has been seen, each state is left free to concede to aliens resident within its territory such measure of rights, apart from the protection of life and property, as it may see fit to confer upon them. As a matter of fact, most states have in modern times voluntarily conceded to resident aliens substantially the same civil privileges, as distinct from political rights, which are enjoyed by citizens of the state. These privileges include the right to hold, inherit, and transmit real property, the right to contract, the right to practise the professions and other

[1] See cases in Moore, *Digest*, IV, § 551.
[2] *Ibid.*, loc. cit.
[3] *Ibid.*, loc. cit. See, further, the decision in the Boffolo case before the Italian-Venezuelan Commission in 1903. Ralston, *Venezuelan Arbitrations*, 699.
[4] The deportations were in accordance with an act of May 10, 1920.

licensed occupations, and the right of religious worship and of freedom of speech. The earlier *droit d'aubaine*, a relic of feudal times, in accordance with which the sovereign confiscated to the use of the state the movable and immovable property of deceased foreigners, had largely disappeared by the end of the eighteenth century.[1] Several states, however, still impose restrictions upon aliens. China has conceded only limited privileges of trade, based upon treaty stipulations. Japan denies to aliens the right to own property in land. Rumania places Jews under legal disabilities.[2] Under the common law of Great Britain and of the United States an alien could take lands by purchase, i.e., by will or by deed, but not by descent, i.e., not by intestate succession.[3] These restrictions have been largely removed by statute, but it should be noted as a point of American constitutional law, as distinct from international law, that while certain States of the United States still prohibit aliens from holding or succeeding to real estate, the restrictions are largely inoperative in consequence of the overruling force of treaties entered into by the United States conceding such privileges to the citizens of the contracting powers.[4]

Discrimination against particular aliens

Special international problems are presented when a state departs from a general rule with respect to the privileges granted to aliens and undertakes to discriminate against the citizens of a particular state. As in the case of discriminations in connection with admission to the state, the basis of complaint on the part of the foreign state in this instance is not an abstract right to particular privileges, but a specific right arising by inference from the principle of the equality of states. In 1906 Japan protested against the denial to its citizens of school privileges similar, not merely equal, to those accorded by the City of San Francisco to alien residents of other nationality. In reply the United States urged, on behalf of the State of California, that there existed a reasonable basis for the alleged discrimination, so that the action did not necessarily reflect upon the character of the Japanese citizen and by inference upon the national honor of Japan.[5] In 1913 a more acute issue arose in connection with the protest of Japan against the discriminatory character of California laws

[1] The practice was vigorously condemned by Vattel, *Droit des Gens* (Eng. trans.), Bk. II, § 112.

[2] As did Russia before the revolution of 1917.

[3] See Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch, 619 (1813).

[4] For instances, see Moore, *Digest*, IV, §§ 544-5.

[5] *Am. Journal*, I (1907), 273 ff.

CHAP. XI

prohibiting aliens who were not "eligible to citizenship" from owning and transmitting real property, except in so far as the right was secured to them by treaty. Since Japanese citizens were unable to become naturalized, they were thus limited to the rights granted by a treaty of 1911, which fell short of the privileges enjoyed by other aliens. The United States urged in defense of the law that it was the result rather of local economic conditions than of direct racial discrimination; but Japan refused to acquiesce in the justice of the explanation.[1] Additional legislation was enacted by California in 1920, with fresh protest from Japan.[2]

Domiciled aliens

International law recognizes a distinction between the status of those aliens who are merely transient visitors in a foreign country and those who have established a permanent residence there with apparent intention of remaining indefinitely. The latter *domiciled* aliens not only enjoy the privileges referred to above, but are in many respects burdened with the obligations of citizenship, although not regarded as citizens from the point of view of national character. Domicile thus creates a sort of qualified or temporary allegiance.[3] Not only must domiciled aliens obey the local laws and pay the normal taxes, whether upon person or upon property, imposed by the state; but should the necessity arise they may be called upon by the state to perform such public duties as police and militia service, as distinct from military service, as well as to submit to special measures, such as quarantine regulations, restricting their personal liberty and the enjoyment of their property in the interest of the public welfare. A delicate question is presented when the state in which the alien is domiciled goes to war with the state of which he is a citizen. In such a case, while the alien may not be drafted into military service, he is at the same time bound not to contribute by any overt act to the success of the state of his allegiance; and while he may not be punished for high treason, he may be subjected to other penalties imposed by state law upon such offenses.[4]

By custom, which may now be said to have obtained a semi-

[1] See *Am. Journal*, VIII (1914), 571. For the text of the California law, *ibid.*, Supp. 177.

[2] See *Am. Journal*, XV (1921), 55; XVI, 420.

[3] See Carlisle *v.* United States, 16 Wallace, 147 (1873), where the court held certain domiciled aliens who had given aid and comfort to the Confederacy were guilty of high treason.

[4] In the case of De Jager *v.* Attorney-General of Natal, L. R. App. Cas., 326 (1907), a British court held guilty of high treason a resident of Natal who during the occupation of that country by the Boer army served in its ranks. Scott, *Cases*, 136; Evans, 113.

Comity in matters of jurisdiction

legal validity, many states have adopted into their judicial systems a body of rules in accordance with which the laws and judicial decrees of foreign countries are applied to the decision of cases involving acts done in a foreign country or property located therein. Such cases may arise between two citizens of the state, or between a citizen of the state and a domiciled alien. This body of rules is known as "international private law," or the "conflict of laws,"[1] and its precise content is a matter of domestic law laid down by the judicial tribunals or the legislatures of the respective states. The element of international law present is not to be found in the specific rules applied to these cases, which are strictly national in their authority, and relate to the acts of individuals, not of states, but is to be found in the general practice of the nations in giving a greater or less degree of validity to the legislation of other states under the particular circumstances. In the case of Hilton *v.* Guyot,[2] decided in 1895, the Supreme Court went so far as to say that "international law in its widest and most comprehensive sense—including not only questions of right between nations, . . . but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law" and must be administered by the courts of justice in cases duly presented to them. The basis of these rules is the "comity of nations," not the extraterritorial validity of the law of the foreign state. Comity, as explained by the Supreme Court in the same case, is in the legal sense "neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[3] The practice of nations varies, however, in the matter, and it is doubtful whether many states push the idea of comity to the same extent as was done in the case just cited.

The detailed rules which make up the body of international

[1] See above, p. 36. [2] 159 U. S., 113.

[3] For the broader sense given to "comity" as a general rule of courtesy falling short of legal obligation, see above, p. 35.

CHAP. XI

Scope of international private law

private law are outside the scope of a volume on international law. In general, however, they embrace questions relating to marriages contracted or divorces granted under the laws of a foreign state,[1] title to real or personal property located in a foreign state, or the transfer of such property by devise or descent, the validity of wills made in a foreign state, the legal capacity of parties contracting under the laws of a foreign state, the enforcement of foreign judgments, and related questions.[2] It must be noted that as a condition of the enforcement of foreign judgments national courts require the fulfilment of certain conditions as to the jurisdiction of the foreign tribunal over the parties and the subject-matter of the case, as well as to the substantial justice of the proceedings. In addition, some states require a reciprocal recognition of their own judgments on the part of the foreign state. In the case of Hilton *v.* Guyot above cited, the Supreme Court refused to give full credit and conclusive effect to the judgment of the French court, on the ground that judgments of American courts were reviewable upon their merits in the French courts.[3]

Conventions regulating the conflict of laws

The desirability of obtaining a greater degree of uniformity in their mutual recognition of foreign laws and judgments has influenced the leading states of Europe on several occasions to enter into international conventions dealing with the conflict of laws. On November 14, 1896, a general treaty was entered into regulating the conflict of laws in respect to procedure in civil cases. Three other conventions were signed on June 12, 1902, regulating the conflict of laws in respect to marriage, divorce, and guardianship.[4] On July 17, 1905, a new treaty was entered into

[1] The refusal of the French tribunals, under the influence of political pressure from the chief executive, to recognize the validity of the marriage of Jerome Bonaparte to Miss Patterson, contracted under the laws of the United States but without observing the forms required by French law, has obtained a place in history by reason of the parties to the case, not by reason of its otherwise exceptional character. Dana, note 55 to Wheaton, *Elements of International Law*, ed. 1866, § 93.

[2] For a bibliography of the subject and a survey of its nature and history, see Beale, *A Treatise on the Conflict of Laws*, Vol. I, Part I, 1916; Westlake, *A Treatise on Private International Law, with principal reference to its practice in England*, 6th ed., 1922; Dicey and Keith, *A Digest of the Law of England with Reference to the Conflict of Laws*, 3rd ed., 1922.

[3] "In holding," said the court, "such a judgment, for want of reciprocity not to be conclusive evidence of the merits of the claim we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity. . . ."

[4] Martens, *Nouv. Rec. Gen.*, 2e ser., XXXI, 706, 715, 724.

replacing the treaty of 1896, while two new conventions were adopted by a smaller group of states dealing with the effect of marriage upon the personal relations and property rights of husband and wife and with further questions of guardianship.[1] An instructive analogy might be drawn between the efforts of the leading states to secure greater uniformity in the mutual recognition of their respective laws and the constructive action taken under more favorable conditions by the Philadelphia Convention of 1787 in introducing into the Constitution of the United States the clause stipulating that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other State."[2]

d. Special exemptions from jurisdiction: suits against foreign states

The principle that a state cannot be sued in the courts of a foreign country is a long-standing rule of customary international law. In earlier times, before the general establishment of democratic states, whether republics or constitutional monarchies, the principle was identified with the personal immunity of a foreign sovereign from suit; but the latter point is now a distinct issue.[3] Diplomatic agents, as representatives of their state, are personally exempt from both the criminal and civil jurisdiction of the state to which they are accredited.[4] A similar exemption holds with respect to personal and real property connected with the foreign embassy or legation. In addition to these exemptions, a foreign state may not be made a party defendant either in a suit *in rem* or in a suit in *personam*, brought against the state as such in its public corporate capacity. In the case of De Haber *v.* Queen of Portugal,[5] decided in 1851, an action of debt was brought against the queen, in her public capacity, for money wrongfully paid over to the Portuguese Government. On appeal the court made an absolute rule for a prohibition of the suit, on the ground that "to cite a foreign potentate in a municipal court, for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent." A similar decision was rendered by the state court of New York in vacating an attachment which had been obtained against certain personal property of the Mexican Government with the object of satisfying in that way certain claims against the Government.

[1] Martens, *Nouv. Rec. Gen.*, 3e ser., II, 243.
[2] Art. IV, Sec. 1. [3] See below, p. 351.
[4] The scope of this immunity and the problems presented by it are discussed in a late chapter, below, pp. 361 ff.
[5] 17 Q. B. Div., 196 (1851). Scott, *Cases*, 278.

CHAP. XI

A foreign state, said the court, could not be sued without its consent, and "so far as jurisdiction is concerned, there is no difference between suits against a sovereign directly and suits against its property."[1]

Suits involving property belonging to a foreign state

A difficult and unsettled question is presented when a foreign state is made indirectly a party defendant in a suit involving property which would normally be governed by the municipal law of the state and fall within the jurisdiction of its courts. Here the foreign state appears rather in its capacity as a private corporation as distinct from its public international personality. In the case of Vavasseur *v.* Krupp,[2] decided in 1878, an injunction had been obtained by Vavasseur to prevent the defendants from delivering to a Japanese vessel of war certain shells bought by the mikado in Germany, which it was alleged had been manufactured in infringement of the plaintiff's patent. On appeal, the higher court set aside the injunction on the ground that, even if there was an infringement of the patent, the "mikado" could not be sued for it. The court held that it had no jurisdiction "to interfere with the property of a foreign sovereign, more especially with what we call the public property of the state of which he is sovereign as distinguished from that which may be his own property." No distinction was made in this case between a suit brought, as in De Haber *v.* Queen of Portugal, against a foreign sovereign as such, and a suit arising out of the title to particular property acquired by a foreign sovereign in the ordinary processes of commerce. The special exemption from jurisdiction accorded to government-owned ships engaged in foreign trade will be discussed below;[3] and there has been a tendency on the part of British courts, and to a lesser degree on the part of American, to extend to other commercial property in possession of a foreign government the same protection extended to foreign vessels. It would seem, how-

[1] Hassard *v.* United States of Mexico, 61 N. Y., 939 (1899). Moore, *Digest*, II, § 258. It should be observed that, where a state voluntarily appears in court as plaintiff for the purpose of obtaining a remedy, the defendant may file a cross-claim or set-off, or take other proceedings to bring all the facts before the court. Strousberg *v.* Republic of Costa Rica, 44 Law Times Rep., 199. But such cross-claim must arise out of the same action, and must not relate to another and distinct matter. South African Republic *v.* Compagnie Franco-Belge, 1 Ch. Div., 190 (1898). In the case of Kingdom of Rumania *v.* Guaranty Trust Co., 250 Fed. Rep., 341, the court, reversing the decision of the lower court, held that a sovereign, suing to recover a deposit, could not be interpleaded against his will by one whose claim arose independently of the deposit in question. See N. Wolfman, "Sovereigns as Defendants," *Am. Journal*, IV (1910), 373.

[2] L. R. 9 Ch. Div., 351.

[3] See below, p. 202.

ever, that, by the analogies of American municipal law, account might well be taken by the courts of the fact that property in the one case is being used in the public service of a foreign state and in the other case is being used by the state in the capacity of a private trader. The American federal courts have in several cases refused exemption from jurisdiction when the property is not already in possession of the foreign state; but the cases relate to libel for salvage services, and they have generally been put in a favored class.[1]

Need of a constructive rule

There is obvious need, as in the case of the exemption from jurisdiction of quasi-public vessels, of a more uniform rule of jurisdiction with respect to property held by the foreign state in both its public and its private capacity. The subject was considered by the Institute of International Law at its meeting in 1891, and a series of articles was adopted under the head, "Competence of Courts in Suits against Foreign States or Sovereigns."[2] Article IX recognizes six kinds of actions in which jurisdiction may be taken against a foreign state: (1) real actions, to obtain possession of property within the territory; (2) actions arising out of the suit of a foreign state as heir or legatee of real or personal property within the territory; (3) actions relating to commercial or industrial property; (4) actions involving counterclaims raised in a suit brought by the foreign state; (5) actions arising out of contracts entered into on the territory; and (6) actions in tort. In view of the increasing tendency toward public ownership of vessels and railways, and the use of subsidiary corporations for purposes of the exploitation of the oil and mineral resources of undeveloped foreign states, it is particularly urgent that a constructive rule of law be adopted by international convention which will protect the interests of private individuals having claims against such property and provide for the necessary exercise of jurisdiction by the local courts.

Personal immunity of foreign sovereigns

Brief mention must be made of the personal immunity from local jurisdiction enjoyed by foreign sovereigns when temporarily within the territory of a foreign state. The former identification of the person of a foreign sovereign with the state of which he was both the legal and the actual head furnished the historical justification for this immunity, which is still granted in

[1] See Weston, "Actions against the property of sovereigns," *Harvard Law Rev.*, XXXII, 266.

[2] *Resolutions*, 90.

CHAP. XI

an age when such sovereigns as remain exercise in most cases only nominal powers. The presidents of republics, who are technically not sovereigns, enjoy the same immunities. A special inviolability attaches to the person of foreign sovereigns, and attacks upon them are regarded as particularly grave offenses. The immunity of the foreign sovereign extends not only to exemption from criminal prosecution, whatever be the character of his acts, but also to exemption from civil suit *in personam* arising out of contract or tort. A unique illustration of this principle is to be seen in the case of Mighell *v.* Sultan of Johore,[1] decided in 1893, in which the plaintiff brought action for breach of promise of marriage against the defendant, who had been known to the plaintiff as a private citizen under the assumed name of Albert Baker, and who had in that character made the alleged promise of marriage. Upon being sued, the defendant disclosed his real character as sultan of the independent state of Johore in the Malay Peninsula, whereupon the court dismissed the proceedings for want of jurisdiction.[2] The immunity from criminal prosecution and civil suit extends likewise to ambassadors and public ministers, as well as to special envoys.[3]

Asylum in foreign legations

The exterritorial privileges conceded by a state to foreign legations for the due performance of their official functions have been made the excuse at times for converting the legation into an asylum for fugitive criminals and political refugees.[4] In the seventeenth and eighteenth centuries an exaggerated conception of the rights belonging to foreign legations led to abuses against which Vattel felt it necessary to protect. Is the ambassador, he asked, to be allowed to avail himself of the immunity of his house so as to make of it "an asylum into which he will admit enemies of the sovereign and of the state, criminals of every sort, and thus protect them from the punishment which they deserve?"[5] Such conduct would, he continued, be contrary to the purpose for which

[1] L. R. (1894), 1 Q. B. Div., 149. Scott, *Cases*, 280; Evans, 205.

[2] It should be observed that the older practice of according to a foreign sovereign jurisdiction over the members of his suite, as illustrated in the *cause célèbre* of Queen Christina of Sweden, who, when residing in Paris in 1656 after her deposition, condemned to death and executed one of her servants, is no longer permitted.

[3] See below, pp. 361 ff.

[4] It is necessary to distinguish between the incidental use of foreign legations as an asylum for fugitives and the general exemption of foreign legations from the territorial jurisdiction of the state in respect to matters connected with the functions of the legations. The latter subject is treated separately below, p. 364.

[5] *Droit des Gens* (Eng. trans.), Bk. IV, § 118.

the ambassador was admitted into the state. But while the earlier practice of giving asylum to ordinary criminals has now been abandoned, it is still the rule that the local police authorities may not enter the residence of the ambassador or minister, but must request of him the delivery of the fugitive. In 1836 a United States federal court considered it in violation of international law that a constable should enter the house of the secretary of the British legation and remove a fugitive slave.[1]

Case of political refugees

The practice of giving asylum to political refugees has likewise been generally abandoned. Even when at its height, it was still qualified by the condition that the foreign embassy must not become in that way a source of danger to the state. Vattel comments approvingly upon the decision of the Council of Castile in the case of the Duke of Ripperda, who, being accused of official misconduct, had taken refuge in the house of the British ambassador. It was decided that he might be taken from the embassy even by force, "since otherwise privileges whose object was to maintain a freer intercourse between sovereigns would on the contrary turn to the ruin and destruction of their authority."[2] Within recent years the few exceptional cases in which asylum has been granted have been confined to legations in Central and South American states, in parts of the Orient, and occasionally in the states of southeastern Europe. In 1875 Secretary Fish, in a letter to the Secretary of the Haitian legation at Washington, referred to the right to grant asylum to fugitives as "one of the still open questions of public law"; and he was frank enough to say that "the instability of the Governments in countries where the practice has been tolerated may in a great degree be imputed to such toleration."[3] In the personal instructions issued by the United States Department of State to its diplomatic agents in 1885, attention was called to the fact that "exterritorial asylum has become so firmly established, that it is often invoked by unsuccessful insurgents," and notice was given that "this government does not sanction the usage, and enjoins upon its representatives in such countries the avoidance of all pretexts for its exercise."[4] An exception was, however, admitted to the extent of permitting temporary shelter to be given to persons whose lives might be threatened by mob violence as distinct from persons evading the

[1] United States *v.* Jeffers, 4 Cranch Circ. Ct. Rep., 704. Scott, *Cases*, 323.
[2] *Op. cit.*, Bk. IV, § 118. See also Martens, *Causes Célèbres*, I, 178.
[3] *U. S. For. Rel.*, 1875, pp. 343 Snow, *Cases*, 142.
[4] Quoted by Snow, *Cases*, 143 n.

CHAP. XI

pursuit of the legitimate agents of justice. The same notification is repeated verbally in the revised instructions issued in 1897.[1] In 1908 a more definite step was taken when the United States delivered to the Haitian Government a group of refugees who had sought asylum in the legation and consulate, and at the same time announced the policy of refusing such asylum in the future.[2] Similar declarations were made by Great Britain and France in respect to their consulates.[3]

Exemption of aliens from local jurisdiction in non-Christian states

During the Middle Ages it was common for commercial towns to concede to foreign merchants the privilege of residing in separate parts of the town and being governed by their own domestic laws. This privilege died out in Europe with the growth of the principle of territorial sovereignty; but it continued to be recognized in Turkey, where, because of the religious character of the Mohammedan law, there were special reasons for permitting foreign residents to remain subject to the law of their own country.[4] A system of "extraterritorial jurisdiction," based partly upon custom and partly upon treaties of unilateral obligation, known as "capitulations," was thus developed, in accordance with which cases relating to foreign citizens were tried before diplomatic or consular courts operating in accordance with the laws of the several states.[5] During the nineteenth century the system was extended to other non-Christian states whose customs and legal systems differed radically from those of Europe. Japan succeeded in releasing itself in 1899 from the limitations imposed upon its sovereignty by the exemption of aliens from its local jurisdiction. Upon the outbreak of the World War Turkey announced the abrogation of the capitulations, which, it asserted, restricted its sovereignty. This unilateral action was contested by the United States; but the matter remained in suspense during the war. At the close of the war the capitulations were temporarily renewed; but by the Treaty of Lausanne of 1923 the contracting parties accepted their "complete abolition."[6] Morocco, Persia, Siam, China, and a few smaller states are still subject to treaty obliga-

[1] *Instructions to Diplomatic Officers of the United States*, § 51.
[2] *U. S. For. Rel.*, 1908, 435.
[3] Alvarez, *Droit International Américain*, 193-4.
[4] For the historical background, see Brown, *Foreigners in Turkey: Their Juridical Status*, Chap. I.
[5] *Ibid.*, Chap. II; "The Capitulations," *Foreign Affairs*, June 15, 1923.
[6] Art. 28, treaty of July 24, 1923.

tions providing for consular courts.[1] In Egypt a special system of *mixed tribunals,* or international courts, was established in 1876, in accordance with which the Egyptian Government appointed a body of judges partly native and partly foreign, the latter being nominated by the respective foreign governments and forming a majority of the court.[2] With the establishment of Egyptian independence in 1922 the abolition of the mixed tribunals was contemplated on condition of the substitution of a British judicial adviser.[3]

[1] At the close of the Washington Conference of 1921-22 a resolution was adopted by the participating powers looking to the promotion of legislative and judicial reforms in China which would warrant the powers in relinquishing their rights of exterritoriality. See *Am. Journal,* XVI (1922), Supp., 76.

By recent treaties Siam is gradually regaining its freedom. See E. R. James, "Jurisdiction over Foreigners in Siam," *Am. Journal,* XVI (1922), 585. By Art. 142 of the Treaty of Versailles, Germany renounced the régime of capitulations in Morocco, as did Austria by Art. 97 of the Treaty of St. Germain.

[2] For details, see Scott, *The Law Affecting Foreigners in Egypt,* rev. ed.

[3] See above, p. 97, n. 2.

CHAPTER XII

JURISDICTION OVER PUBLIC AND PRIVATE VESSELS

a. Jurisdiction outside territorial limits

International law recognizes in certain cases the right of a state to extend its jurisdiction beyond its territorial limits. Since the relationship between the state and its citizens is a personal one, the allegiance of the citizen is due to the state in whatever part of the world the citizen may happen to be. The state gives him protection and may exact of him obedience to its laws in so far as it judges them to be applicable. It is true that a state cannot hold its citizen to the observance of its laws while he is within the jurisdiction of another state; but it may, as has been seen,[1] if it so chooses, call him to account when he returns again within its jurisdiction. On the other hand, if the citizen is in unoccupied territory not subject to the jurisdiction of any power, or if he is on board a vessel flying the flag of the state on the high seas, the state may place him in the same legal position as if he were on the soil of the state itself, and may apply its domestic laws, both civil and criminal, to whatever acts he performs or whatever circumstances attend them. It is in respect to jurisdiction over merchant vessels that the extension of the territorial jurisdiction of the state finds its most significant application.

b. The national character of merchant vessels

International law has no rules regulating the conditions under which vessels are entitled to fly the flag of a particular state and are accordingly invested with a degree of the national character possessed by citizens of the state. Each individual state fixes its own conditions of registration, and there is no uniformity in respect to them. Some states, such as Great Britain, Germany before 1914, and the United States before 1917, refuse to permit the registration of vessels not owned in whole by citizens of the state.[2] Other states admit to registration vessels owned only in part by citizens of the state, or even vessels owned by foreigners. All that international law has prescribed is that some one state, and that a maritime state, must authorize the vessel to use its flag, provide

[1] See below, p. 213.

[2] For the attitude of the United States, see Moore, *Digest*, II, §§ 321, 322.

it with the proper "ship's papers," and thereupon exercise in respect to the vessel the degree or jurisdiction permitted by the law. In the absence of these conditions no state will either claim any rights or jurisdiction over the owners of the vessel or the persons on board or hold another state to account for failure to exercise jurisdiction. Constructive proposals have been made from time to time for the adoption of more uniform regulations concerning the use of the national flag. In 1896 the Institute of International Law adopted at its annual meeting a series of ten rules bearing the title "Rules Relative to the Use of the National Flag by Merchant Vessels";[1] but no action in the matter has yet been taken by governments.

Theoretical basis of jurisdiction over merchant vessels

A theory put forth in the eighteenth century in explanation of the jurisdiction exercised by a state over vessels flying its flag won sufficient acceptance to lay claim for a time to be regarded as a principle of international law. Vessels were held to be floating portions of the territory of the state; they were extensions or prolongations of the home state; so that what took place upon them was regarded as taking place upon the soil of the state. This fiction of the "exterritoriality" of vessels, while it finds expression in numerous decisions of British and American courts,[2] has been rejected by most modern writers on the ground that, while it is a convenient explanation of the greater part of the relations which the vessel and persons on board bear to the state of the vessel's flag, it is inconsistent with other relations affecting the vessel both on the high seas and in foreign ports.[3] A better basis of jurisdiction might be found in the fact that the jurisdiction of the flag state has been acquiesced in by other states simply as a matter of mutual convenience. Since it is necessary that some

[1] *Resolutions*, 135.

[2] The theory was forcibly expressed in 1842 in a letter written by Webster as secretary of state to the British foreign minister in answer to the assertion by Great Britain of a right of impressment through the visit and search of American vessels. "Every merchant vessel on the seas," said Webster, "is rightfully considered as part of the territory of the country to which it belongs." Moore, *Digest*, II, § 320. Webster's letter is quoted at length in United States *v.* Rodgers, 150 U. S., 249 (1893), Scott, *Cases*, 222, where the court specifically reaffirms the theory.

[3] The history and inadmissible character of the theory is well set forth in Hall, *International Law*, § 75. In the recent decision of Cunard Steamship Co. *v.* Mellon, 262 U. S., 100 (1923), the court dismissed the suggestion that a merchant ship is a part of the territory of the country whose flag it flies as being "a figure of speech,—a metaphor." The jurisdiction arises, said the court, "out of the nationality of the ship as established by her domicile, registry, and use of the flag, and partakes more of the characteristics of personal than of territorial sovereignty."

CHAP. XII

one state should exercise jurisdiction over the vessel, let the state which chooses to assume a degree of responsibility for the vessel by permitting it to fly its flag be the state whose law must be held to control acts done on board the vessel. Thus, by regarding the jurisdiction of the flag state as qualified rather than absolute, it is easier to reconcile with it the jurisdiction possessed by other states over the vessel when it is temporarily in their ports, as well as the belligerent right of visit and search on the high seas when the flag of the vessel is neutral in time of war.

Exceptions to the general principle

The jurisdiction of a state over its merchant vessels on the high seas is subject to a number of exceptions. In the first place, the customary laws of war give to a belligerent the right of visit and search of all vessels in the enforcement of the rules of contraband and blockade.[1] In this connection it should be noted that the United States vigorously contested during the Napoleonic wars the attempt on the part of Great Britain to enforce on board American vessels the British municipal law of allegiance.[2] In his war message of June 1, 1812, President Madison asserted that on the high seas no laws should operate except "the law of nations [i.e. the traditional law of contraband and blockade] and the laws of the country to which the vessels belong."[3] In the second place, in the exercise of the right of self-protection against piracy, states have the right, put into effect by their public ships, to approach all merchant vessels, whatever their ostensible nationality, with the object of verifying their flag and, in case the circumstances are suspicious, to visit and search the vessel to obtain more conclusive evidence of its character.[4] In the third place, international conventions have been entered into providing for a limited right of visit and search for the suppression of the slave trade.[5] Lastly, a state has the right in self defense to seize a vessel flying the flag

[1] For the scope of this belligerent right and the problems arising in connection with it, see below, p. 511.

[2] The British Government did not assert that its men-of-war might search a neutral vessel for the express purpose of finding seamen of British nationality, but it did claim—and the distinction was without practical difference—that, if in the exercise of the belligerent right of visit and search for contraband, British seamen were found on board they might be impressed into the British navy. On the other hand, the United States, by successive secretaries of state, insisted during the long period of the controversy, from 1792 to 1842, that such searches were open to the gravest objections, and that, in the language of Jefferson, "the simplest rule will be that the vessel being American shall be evidence that the seamen on board are such." Moore, *Digest*, II, § 317.

[3] See Moore, *Principles of American Diplomacy*, 275.

[4] See below, p. 204.

[5] See below, p. 206.

of another state under circumstances indicating that the vessel either is fraudulently registered or is being used by insurgents and rebels as a means of attack upon the state. Had the action of Spain in the case of the *Virginius*[1] extended no further than the mere capture of the vessel and the imprisonment of its crew, there would have been no international ground of offense against the state of the vessel's flag.

c. Jurisdiction over merchant vessels in foreign ports

When merchant vessels leave the high seas and enter foreign ports, the jurisdiction of their national state comes into conflict with the jurisdiction of the foreign state. This conflict has been adjusted, by custom and convention, so as to permit the exercise of a limited jurisdiction by the flag state, without encroaching upon the ultimate right of the territorial state. "It is a part of the law of civilized nations," said the court in Wildenhus's Case,[2] "that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement." In an opinion rendered by the French Council of State in 1806 it was held, in the cases of the *Sally* and the *Newton*,[3] that in conformity with international usage the rights of the national power, i.e., of the flag state, "should be respected as relating to the internal discipline of the vessel, with which local authority may not interfere when its aid is not sought or when the tranquillity of the port is not endangered."

Matters relating to internal discipline

This rule, of uncertain force in customary law, has now been generally adopted by treaty.[4] No very definite line, however, has been drawn between matters relating to the internal discipline of the vessel and matters disturbing the peace of the port. The Supreme Court of Mexico held in 1875 that the murder of a Frenchman by another Frenchman on board a French vessel in a Mexican port did not necessarily disturb the peace of the port.[5] On the other hand, the French Court of Cassation rendered a contrary decision in 1859.[6] The attitude of the American courts

[1] See above, p. 144.

[2] See below, p. 194.

[3] Stowell and Munro, *Cases*, I, 246. Snow, *Cases*, 121. Cited by the court in Wildenhus's Case.

[4] In illustration of such treaty provisions, see Article XI, treaty of March 9, 1880, between the United States and Belgium, Malloy, *Treaties*, I, 94, the application of which was at issue in the case of Wildenhus, below mentioned.

[5] Case of *L'Anémone*, Snow, *Cases*, 124.

[6] Case of the *Tempest*, Snow, *Cases*, 122.

CHAP. XII

is shown in the case of Wildenhus,[1] decided in 1886, in which the Belgian consul asked for a writ of habeas corpus on behalf of Wildenhus, who had committed murder on board a Belgian steamer in the port of Jersey City. The court held that the crime was of such a nature as by its very commission to "disturb tranquillity and public order on shore or in the port," so that it must be regarded as falling within the exceptional cases provided for in the treaty of 1880, in which the local authority might interfere.[2]

Stores of intoxicating liquors

A novel ground for interference by the local government in the internal discipline of foreign ships in port was presented in 1920 by the Eighteenth Amendment of the United States Constitution, with its supplementary enforcement legislation, known as the Volstead Act.[3] The amendment prohibited the manufacture, sale, transportation, importation, or exportation of intoxicating liquors within, into, or from the United States and all territory subject to its jurisdiction.[4] The enforcement act contained more specific provisions to the same effect and prescribed that the act should be "liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." Following the passage of the law a number of steamship companies sued for an injunction to prevent the application of the law to supplies of liquor carried by their ships for the consumption of passengers and crew. In the case of Cunard Steamship Company *v.* Mellon[5] the Supreme Court of the United States held, first, that the amendment "could be made to cover both domestic and foreign merchant ships when within the territorial waters of the United States";[6] secondly, that the amendment did intend such an effect. The jurisdiction of a nation within its own territory, said the court, is necessarily

[1] Mali *v.* Keeper of the Common Jail, 120 U. S. 1 (1886). Evans, *Cases*, 89; Stowell and Munro, *Cases*, I, 253.

[2] A constructive effort to secure greater uniformity in the practice of states in the matter of jurisdiction over merchant vessels in foreign ports was made by the Institute of International Law at its meeting in 1898, when a series of "Regulations concerning the legal status of ships and their crews in foreign ports" was adopted. *Resolutions*, 143.

[3] The act was approved October 28, 1919, and bears the title of the National Prohibition Act.

[4] The amendment provides: "After one year from the ratification of this Article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

[5] 262 U. S., 100 (1923). *Am. Journal*, XVII (1923), 563.

[6] By the word "could" the writer assumes that the court meant that such action would not be in contravention of international law, since the amendment must in any case be the final word in respect to the duties of public officers.

exclusive and absolute, and any exception to such jurisdiction must arise from the consent of the nation itself.[1] No such exception was to be found in the terms of the amendment, and none could be "reasonably regarded as implied."[2] The sole exception recognized by the law was that of "liquor in transit through the Panama Canal or on the Panama railroad."[3]

Following this decision of the court the revenue officers of the United States were instructed to enforce the prohibition law to the extent of searching foreign vessels in port and in certain instances breaking the customs seals with which sea stores of intoxicating liquor had been guarded to insure that there would be no consumption of such liquors until the vessel should again be outside the three-mile limit. The breaking of the seals of the steamship *Baltic* in June, 1923, while calling forth protest from individual members of the British Parliament, was acquiesced in by the British Government as offering "no grounds for protest."[4]

Civil suits against foreign vessels in port

Merchant vessels in foreign ports are not exempt from civil suit *in rem* brought by a citizen of the foreign state, nor are the officers or crew of the vessel exempt from civil suit *in personam* or from criminal prosecution by the foreign government for acts in contravention of the laws of the state. But the jurisdiction of the foreign state does not, according to one precedent, extend so far as to interfere with personal and property rights on board the vessel as regulated by the law of the flag state. In the case of the *Creole*,[5] submitted to arbitration by the United States and Great Britain in 1853, it was held by the arbitrator that the authorities of Nassau, in liberating a number of slaves who had revolted against the officers of the ship and had put in at the port of Nassau, had acted "in violation of the established law of nations," and that the claimants were "justly entitled to compensation for their losses."

The authority of the foreign consul to take cognizance of cases

[1] The court cited at length the case of the Schooner Exchange *v.* McFaddon. See below, p. 201.

[2] In a dissenting opinion Justice Sutherland urged that while there was no question as to the power of Congress to do what the court held had been done, "due regard for the principles of international comity, which exist between friendly nations, in my opinion, forbids the construction of the 18th Amendment and of the act which the present decision advances."

[3] For editorial comment upon the decision, see *Am. Journal*, XVII (1923).

[4] See statement of Prime Minister Baldwin in Parliament, June 25, 1923. For the proposed exemption of British vessels from such seizures on condition of the British Government's permitting the seizure within a twelve-mile limit of "rum-runners" flying the British flag, see below, pp. 255-256.

[5] Moore, *International Arbitrations*, IV, 4375; *Digest*, II, 358.

CHAP. XII

arising between the captain and crew of the vessel is wholly dependent upon treaty provisions, so that in the absence of such provisions the Supreme Court of Hong Kong, in the case of Ellis *v.* Mitchell,[1] held in 1874 that the American consul should not intervene to settle a dispute as to wages between a seaman and the master of the ship. The same principle was affirmed in the case Dainese *v.* Hale,[2] in which the Supreme Court of the United States laid down the general rule that "it may now be considered as generally true, that, for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express provisions of the treaties entered into with that nation, and to the laws of the States which the consuls represent."

Concurrent jurisdiction of several states

It will be observed that, in consequence of the territorial and personal grounds upon which jurisdiction is assumed over the conduct of individual persons, the same act committed on board a vessel may be at once subject to the jurisdiction of a number of states: to the state whose flag the vessel flies, to the state within whose territorial waters the vessel happens to be, and to the state to which the individual owes allegiance. The jurisdiction of any one of these states can, of course, only be exercised singly, with due respect to the prior rights of the state within whose territory the individual happens to be at the time. In the case of Regina *v.* Anderson[3] an American citizen was convicted by a criminal court of Great Britain for murder committed on board a British vessel in French waters. The court held that "although the prisoner was subject to the American jurisprudence as an American citizen, and to the law of France as having committed an offense within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country." A similar decision was rendered in United States *v.* Bennett,[4] in 1877, a case in which the crime was committed on board an American vessel in French waters.

But while a state may exercise, or forego exercising, jurisdiction over offenses committed on board a merchant vessel in its territorial waters, it is not at liberty to try persons on board such foreign vessels for offenses committed on the high seas. Hence the British Government disavowed the action of the local authori-

[1] *U. S. For. Rel.*, 1875, p. 600.
[2] 91 U. S., 13 (1875).
[3] 11 Cox C. C., 198 (1868). Scott, *Cases*, 351; Evans, 172.
[4] 3 Hughes, 466 (1877).

ties at Calcutta in trying one Anderson for a crime committed upon an American merchant vessel on the high seas.[1] In an earlier case, occurring in 1856, the United States Department of State protested against the action of the local French authorities at Marseilles in retaining possession of persons who had committed mutiny on an American vessel, the *Atalanta*, on the high seas and who had been imprisoned by the local authorities at the request of tht consul.[2] A unique illustration of the passage of a merchant vessel from the law of one state into that of another is furnished by the case of Regina v. Lesley,[3] in which it was held that the master of a British vessel might, upon his arrival in Great Britain, be prosecuted for false imprisonment for the act of transporting banished Chileans, although the act of the defendant in contracting with the Chilean Government to transport them was justifiable in its inception, having been done within Chilean territorial waters.[4]

Jurisdiction over cases of collision on the high seas

In two matters of slight intrinsic importance international law has worked out a system of concurrent jurisdiction which is of considerable historical interest, and which presents an instructive analogy for the constructive development of international judicial institutions. In cases of collision on the high seas the courts of a number of the leading states undertake to assume jurisdiction in suits *in rem* brought by the injured party against the alleged guilty vessel of whatever nationality. The same custom holds where proceedings are instituted for salvage for the rescue of shipwrecked vessels. When the defendant vessel is sued in the courts of the state whose flag it flies, no question of jurisdiction can be raised. Practice is not uniform, however, in cases in which a vessel flies a foreign flag, or in which the parties are both citizens of the same foreign state. In the case of the *Scotia*,[5] decided in 1872, the courts of the United States assumed jurisdiction in a suit brought by an American sailing-vessel against a British steamer for damages resulting from the loss of the vessel in a collision on the high seas. In the case of the *Belgenland*,[6] decided in 1885, jurisdiction was exercised in a similar suit for damages brought by the captain of a Norwegian bark against a British

[1] Wharton, *Digest*, I, 123.
[2] Scott, *Cases*, 354, n. 38, citing Snow.
[3] *Bell's Crown Cases*, 220 (1860). Scott, *Cases*, 349.
[4] The whole subject of jurisdiction over merchant vessels appears to be ready for constructive codification by means of a general convention of statutory character.
[5] 14 Wallace, 170 (1871). Evans, *Cases*, 5.
[6] 114 U. S., 355. Evans, *Cases*, 81.

CHAP. XII

steamer. In presenting its opinion the court cited an earlier British case, the *Johann Friedrich*,[1] decided in 1839, in which the High Court of Admiralty entertained jurisdiction in a suit brought by the owner of a Danish ship against a Bremen ship. The basis upon which jurisdiction was assumed in these and other cases was the necessity of doing present justice to the injured party, who, if unable to sue in the nearest port, might have to go to the ends of the earth to seek his remedy.[2]

Jurisdiction in suits for salvage

The jurisdiction exercised over foreign vessels in cases of salvage is based upon the same principle, that the question involved is one *communis juris*. In the case of the *Two Friends* [3] the British Court of Admiralty, in 1799, entertained jurisdiction in a suit for salvage brought against an American ship which had been captured by the French and afterward rescued by the crew, who, however, were British subjects by birth. In explaining the basis of the jurisdiction taken, the court said that "salvage is a question of *jus gentium*," and it could "see no reason why one country should be afraid to trust to the equity of the courts of another on such a question of such a nature, so to be determined." In a similar suit for salvage brought in a port of the United States by a British ship against a French ship,[4] the Supreme Court of the United States held that "where such controversies are *communis juris*, i.e., where they arise under the common law of nations, special grounds should appear to induce the court to deny its aid to a foreign suitor when it has jurisdiction of the ship or party charged." On the other hand, in the case of the *Reliance*,[5] decided in 1848, the federal district court, while reiterating that salvage was "essentially a question of the *jus gentium*," held that the doctrine that jurisdiction may be assumed in cases involving foreigners was not "peremptory," and it refused to hear the case before it on the ground that the suit was brought by British libellants against goods destined to a British port under circumstances which could best be passed upon in a British port. It should be noted that the assumption of jurisdiction in cases of collision and of salvage is to be distinguished from the refusal of

[1] 1 W. Rob., 35.

[2] While the subject falls more strictly under municipal law, the element of international comity in the mutual acceptance by national courts of jurisdiction in such cases brings the subject within the outer fringes of international law.

[3] 1 C. Rob., 271.

[4] Mason *v.* Le Blaireau, 2 Cranch, 240 (1804).

[5] 1 Abbott's Adm. Rep., 317.

the courts to interfere in disputes between the masters and crews of foreign vessels as to wages and service contracts.[1]

Basis of jurisdiction

The jurisdiction assumed by national courts in these cases is partly due to the fact that by long custom there has grown up a body of maritime common law to be applied with even justice whatever the nationality of the parties to the case. In the presence of this common law of the sea, states have been willing to recognize the exercise of a reciprocal jurisdiction in cases not otherwise properly before the court. It is on this point that a question, otherwise one of private law only, becomes one of public international law. The content of this common law traces its origin back to the early Rhodian law, to the Amalfitan table, to the ordinances of the Hanseatic League, and to other early codes of international private law. "Whatever may have been its origin," said the court in the case of the *Scotia*,[2] "whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world."

Efforts have been made from time to time to secure the adoption of a general international convention of statutory character. In 1888 the Institute of International Law formulated a series of eight rules.[3] In 1889 a maritime conference held at Washington recommended to the states represented the adoption by each state individually of a common body of rules for preventing collisions at sea. A later International Maritime Conference, which met at Brussels in 1910, indorsed a draft convention concerning collisions for separate national adoption.[4] At the same time a separate draft convention concerning salvage was offered in like manner for individual enactment.[5]

Asylum on foreign merchant ships

Foreign merchant ships, not being exempt except by comity from the jurisdiction of the state in whose ports they drop anchor, may not be made an asylum for fugitive criminals or political refugees. It has been questioned, however, whether a foreign

[1] See above, p. 196.
[2] 14 Wallace, 170 (1871). Evans, *Cases*, 5.
[3] *Resolutions*, 83.
[4] For the text of the draft, see *Am. Journal*, IV (1910), Supp. 115. For comment, *ibid.*, IV, 412.
[5] By contrast with the international conventions adopted upon related subjects of common interest, the method of individual enactment of draft codes may be compared with similar action by the States of the United States, e.g., in the adoption of a uniform Negotiable Instruments Act.

CHAP. XII

merchant ship is so far under the jurisdiction of the state as to give the local authorities the right to enter upon the vessel and arrest a passenger who, as a political refugee, has taken passage upon the vessel in the port of a third state. Calvo relates the case of one Sotelo, a political refugee who took passage in 1840 on board a French vessel at one Spanish port and was arrested upon the arrival of the vessel at a second Spanish port. Diplomatic correspondence between the two countries established the complete right of Spain to execute its laws within its territorial jurisdiction without disrespect to the foreign flag.[1] In the case of Gomez (Gámez), a political refugee from Nicaragua who took passage on board a United States steamship in the harbor of Guatemala in 1885, and whose arrest was sought by the local authorities when the vessel stopped *en route* at a port of Nicaragua, the Department of State refused to support the action of the captain in declining to deliver the passenger. "It is clear," said Secretary Bayard, "that Mr. Gomez voluntarily entered the jurisdiction of a country whose laws he had violated. Under the circumstances it was plainly the duty of the captain of the Honduras to deliver him up to the local authorities upon their request."[2] In contrast to the ruling in the Gomez case, Secretary Blaine contested in 1890 the right of the Government of Guatemala to demand the surrender of Barrundia, a political refugee who had taken passage on board a Pacific Mail steamer at a Mexican port, and who was temporarily within the jurisdiction of Guatemala when the vessel called at a port *en route*.[3] In a later case involving a political refugee from Honduras named Bonilla, Secretary Gresham, while admitting the right of the local authorities to demand the surrender of a passenger, instructed the American minister to protest against the act of the commander of the port in firing upon the vessel because the captain refused to surrender the refugee.[4]

d. Jurisdiction over public vessels

In practice if not in legal theory, the jurisdiction of a state over its public vessels, whether on the high seas or in foreign ports, stands upon a different footing from the jurisdiction of the state over privately owned vessels flying its flag. Public vessels, whether men-of-war or naval auxiliaries, are immediately identified with the personality of the state. The fiction of "exterritoriality"

[1] *Droit International*, 4th ed., I, 569; quoted by Snow, *Cases*, 147.
[2] *U. S. For. Rel.*, 1885, p. 82. Snow, *Cases*, 149.
[3] See Moore, *Digest*, II, § 307, where the defense offered by the American minister for his action in advising the surrender of the passenger is given.
[4] *Ibid.*, loc. cit.

is borne out in the actual position they enjoy, as well as in legal theory. Both on the high seas and in foreign ports they are "floating portions" of the territory of their state. They may not, as neutrals, be visited, searched, or detained by belligerent war-ships in the enforcement of the law of contraband and blockade. When in foreign territorial waters they are completely exempt from local jurisdiction, in respect not only to the internal discipline of the ship but even to crimes committed on board ship by persons not members of the crew, or committed in the port itself by one who has taken refuge on board. In the latter case the commander may agree to surrender the offenders; but should he refuse to do so the foreign state must secure redress, if any, through diplomatic channels. By reason of their territorial character, public vessels in foreign ports have frequently been made an asylum for political refugees, particularly in times of revolutionary disturbances in Central and South American countries. States have the right to refuse permission to foreign war-ships to enter their ports; but having admitted them they must, even in cases of misconduct on their part, resort to diplomatic, rather than local judicial, procedure against them.

Exemption of public vessels from civil suit

The question whether public ships in foreign ports are subject to civil suit *in rem* has been passed upon by British and American courts in several important cases. In the case of the French man-of-war *Exchange*,[1] a vessel owned by an American citizen had been seized by Napoleon in 1810 and commissioned as a public vessel of France. In a suit brought by the original owners against the vessel upon its arrival in the port of Philadelphia, the Supreme Court, after a lengthy review of the law which has become classic, held that the public character of the vessel exempted it from the jurisdiction of the American courts.[2] The decision is paralleled by that of the British High Court of Admiralty in the case of the *Constitution*,[3] in which the court refused to issue a warrant, served by a British steam-tug, for payment of salvage for the rescue of the ship when stranded on the English coast. Greater difficulty was experienced by the British courts in reaching the conclusion that public vessels, other than war-ships, should be exempt from

[1] Schooner Exchange *v.* McFaddon, 7 Cranch, 116 (1812). Scott, *Cases*, 300; Evans, 232.

[2] The case, as authority for the complete jurisdiction of a state over foreign vessels in port, except in so far as voluntary relaxations have been consented to in practice, is cited at length in Cunard Steamship Co. *v.* Mellon, above, p. 194.

[3] L. R. 4 P. D., 39 (1879). Scott, *Cases*, 310, n. 22.

CHAP. XII

local jurisdiction. In the case of the *Parlement Belge* [1] the Court of Appeals reversed the judgment of the High Court of Admiralty and held that a publicly owned vessel of the state of Belgium, used as a mail-packet as well as for general commercial purposes, was exempt from suit *in rem* for damages arising out of a collision. The court held that even though an action *in rem* were an action against the property only, suit could not be brought; but it went on to show that in an action *in rem* the owner of the property is indirectly impleaded and that "to implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence."

Difficulties attending such exemption

The case of the *Parlement Belge* is of particular importance owing to the modern practice of states in taking over privately owned vessels into the public service as naval auxiliaries, and chiefly owing to the more recent practice of the United States and other states in owning and operating a fleet of merchant vessels engaged in ordinary trade. In the case of the *Porto Alexandre,*[2] involving the salvaging of a trading vessel owned by the state of Portugal, the British court called attention to the fact that, now that "the fashion of nationalization is in the air" and states are trading with public ships, "if these national ships wander about without liabilities, many trading affairs will become difficult." Nevertheless, the court felt that, owing to the precedent of the *Parlement Belge,* the remedy was not with the courts. The American courts have on several occasions held foreign public ships immune from suit *in rem,* even though used for mere commercial purposes. On the other hand, in a recent decision of a federal district court,[3] it was held that the steamship *Pesaro,* owned by the king of Italy but manned by civilian officers and crew under the direction of a government department, and engaged in ordinary commercial trade, was not immune from process *in rem* brought against the ship to enforce a claim for damages to a cargo of olive-oil carried by it. As in the case of jurisdiction over private vessels in foreign ports, the practice of the nations regarding public vessels of the above character is so lacking in uniformity that a constructive rule of law is urgently needed.[4]

[1] L. R. 5 P. D., 197 (1880). Evans, *Cases,* 242.

[2] 36 Times L. R., 66 (1919). Evans, *Cases,* 253; *Am. Journal,* XIV (1920), 273

[3] 277 Fed. Rep., 473 (1921). See also the *Attualita,* 238 Fed. Rep., 909. Contra, the *Roseric,* 254 Fed. Rep., 154.

[4] See Report of Subcommittee No. 2 of the Committee for the Advancement of International Law, *Proceedings,* Am. Society of Int. Law, 1922, p. 62.

Asylum on foreign warships

The exemption from the territorial jurisdiction of a state accorded to foreign war-ships lying in its harbors has, as in the case of legations, led to the granting of asylum upon them to fugitives from justice. This practice, however, is not so direct a limitation upon the sovereignty of the state; and while asylum is no longer granted to ordinary criminals, it is still granted quite frequently to political refugees. In 1820, in an opinion in the case of one John Brown,[1] a British subject who had escaped from prison and taken refuge upon a British war-ship in the harbor of Lima, Sir William Scott asserted that he knew of "no such right of protection belonging to the British flag," and thought such a pretension unfounded in point of principle and injurious to the rights of other countries. In 1849, however, the British Government made a distinction between fugitives from the sentence of a court of law and political fugitives, claiming a right of asylum for the latter.[2] This distinction obtained the sanction of general practice.[3] In view, however, of the serious objection attending it, the United States has on its part discouraged the granting of asylum by its war-ships. In the Regulations of the United States Navy issued in 1913 it is laid down that "the right of asylum for political or other refugees has no foundation in international law."[4] While it is recognized in the Regulations that usage sanctions the granting of asylum in countries subject to frequent revolutions, it is directed that even in such cases asylum should be granted only in extreme cases, as to refugees from mob violence. It should be noted that, in the above instances in which asylum is granted, there is no "right of asylum" on the part of the refugee. The right, if any exists, inheres in the state which authorizes its legations or public vessels to grant asylum, and the correlative duty in the case is that which devolves upon the local government to acquiesce in the derogation from its territorial jurisdiction.

The suppression of robbery on the high seas has never been

Also, Weston, "Actions against the Property of Sovereigns," *Harvard Law Rev.*, XXXII, 266.

[1] Snow, *Cases*, 144.

[2] See opinion of Lord Palmerston, quoted by Snow, *Cases*, 146, n.

[3] At its meeting in 1898 the Institute of International Law gave its qualified approval to the distinction, by incorporating in the regulations adopted the provision (Art. 19) calling upon the commander of a ship "if he shall receive political refugees on board" to make certain that they were such, and to see to it that no advantage was taken of the asylum to further the political cause of the fugitive. *Resolutions*, pp. 144, 148.

[4] *U. S. Navy Regulations and Naval Instructions*, 1913, Art. R-1649.

CHAP. XIII

e. Concurrent jurisdiction on the high seas: the suppression of piracy

disputed as a legal act of national self-defense. Pirates, by custom of immemorial origin, have been *hostes humani generis*. Grotius pointed out, with references to the law of ancient Rome, that a body of pirates did not constitute a state, and that the laws of war did not apply to their acts, as if done under the authority of an organized state.[1] Pirates, therefore, having cut themselves off from organized society for purposes of crime, are outside the pale of international law. As no state was responsible for their acts, so on the other hand no state might claim an infringement of its rights if persons, nominally its citizens, were captured in the act of robbery on the high seas and summarily executed by the captors or condemned by the courts of the captors' state. The crime is in most cases a capital one, but the precise punishment for it depends upon the municipal law of the state exercising jurisdiction. In the effort to suppress piracy the public vessels of a state have the right to stop and visit a suspicious vessel for the purpose of verifying her papers and the flag she is flying, subject, however, to payment of damages in case the suspicion should prove to be unfounded. In the case of the *Marianna Flora*[2] the Supreme Court held that no damages were due to a Portuguese vessel which had been approached by an American armed schooner under circumstances justifying inquiry, although as a result of the approach an engagement took place and the Portuguese vessel was silenced by the guns of the American vessel and thereupon brought into port and libeled for alleged piratical conduct.

Piracy and privateers

The chief problems of modern international law presented by the suppression of piracy have arisen in connection with maritime war. In the first place, until the latter part of the nineteenth century belligerents were in the habit of arming private ships with the object of preying upon the merchant vessels of the enemy. These "privateers," operating under a commission or letter of marque from the belligerent government,[3] were distinguished from pirates in that their acts of depredation were not committed with intent to rob (*animo furandi*), and at the same time the vessels were responsible for their conduct to the state which had commissioned them. Obviously there was room for many abuses. Irresponsible persons obtained commissions and carried on their depredations without due regard for the laws of war. It was a

[1] *De Jure Belli et Pacis* (Eng. trans.), Bk. III, Chap. III, § II.
[2] 11 Wheaton, 1 (1826). Scott, *Cases*, 1009; Evans, 160.
[3] See below, p. 493.

clear case of piracy if the same commander obtained a commission from both belligerents with the object of making indiscriminate captures. A more debatable question raised was whether it was lawful for the citizen of a neutral state to take a letter of marque from one or other of the belligerents. France maintained the negative in its war with Mexico in 1839, and President Polk suggested in 1846 that the bearers of commissions issued by the Mexican Government in blank and sold to foreigners might be regarded by the criminal courts as pirates.[1] These positions, however, can not be regarded as a correct statement of the law of that day.

Status of vessels in the service of insurgents

A further problem is to determine when commissions issued by insurgent bodies must be regarded as due authorization for the commission of hostilities, whether by public vessels in their service or by privateers. The question is complicated with that of the recognition of such insurgent communities as lawful belligerents.[2] As a general rule, the government against which the insurgents are in revolt has, wherever the circumstances have not forced a contrary decision, considered captures made by them on the high seas as acts of piracy; but its action in the matter raises no question of international law. The attitude of third states has been determined largely by the circumstances of each individual case. In general, however, it has been the rule to recognize the legal character of operations of war conducted by vessels in the service of insurgents when the insurgents have been recognized as belligerents, even should these operations involve injury to neutral property on the high seas or restrict neutral trade, although this latter point is more doubtful.

Where no such recognition has been given, captures made under the alleged authority of an insurgent state may or may not be regarded as piracy according to the circumstances. In the case of United States *v.* Smith [3] the court held the defendant who, with other members of the crew of a private armed vessel, mutinied, and then seized another vessel and without a commission undertook to capture a Spanish vessel on the high seas, was guilty of piracy "as defined by the law of nations" and might be punished by the courts of the United States in accordance with the act of Congress of 1819. In the case of the Magellan Pirates [4] the British court

[1] See Hall, *International Law*, § 81.
[2] See above, p. 108.
[3] 5 Wheaton, 153 (1820).
[4] 1 Spinks, 81 (1853). Scott, *Cases*, 345.

CHAP. XII

was ready to hold certain insurgents guilty of piracy for particular acts not connected with the insurrection, without raising the question of their right to conduct operations as insurgents. On the other hand, in 1873 Great Britain, France, and Germany were unwilling to regard as piracy the naval operations of certain Spanish insurgents who had obtained possession of Spanish men-of-war stationed at Cartagena, although the Spanish Government had proclaimed them pirates. The three powers, however, made their attitude dependent upon the non-interference of the insurgent vessels with their own neutral commerce.[1] A similar decision was rendered by the Brazilian court in 1877, in the case of the Cuban insurgent vessel *Montezuma*.[2] When, however, the Peruvian vessel *Huascar* [3] undertook to requisition coal from neutral British vessels and to take from another British vessel two Peruvian officers on board, a British admiral regarded her acts as piratical and fired upon her.

The position taken by the United States district court in 1885 in the case of the *Ambrose Light* [4] gave rise to considerable controversy. In that case a vessel duly commissioned by Colombian insurgents was seized by an American gunboat and brought into the port of New York for condemnation. No proof was shown of any intention on the part of the vessel to commit hostilities other than such as might be incident to the struggle against the established government. The court held that the precedents all went to show "that recognition by at least some established government of a 'state of war,' or of the belligerent rights of insurgents, is necessary to prevent their cruisers from being held legally piratical by the courts of other nations injuriously affected"; so that the public vessels of all nations had "the right to seize as piratical" vessels operating under the void commissions from such unrecognized insurgents.

The suppression of the slave trade

Since piracy was an international crime and those guilty of it were regarded as outside the pale of international law, the application of the law to the facts, as well as the precise punishment of the offense, was left to the municipal law of the individual state. So long as the statutory definition of piracy kept within the definition of customary international law, the state might execute its laws within its own jurisdiction as against persons of whatever

[1] Hall, *International Law*, § 82, taken from Calvo, §§ 1146-1148.
[2] Snow, *Cases*, 206, quoting Calvo, *Droit International*, 4th ed., I, 591.
[3] Moore, *Digest*, II, § 331.
[4] 25 Fed. Rep., 408 (1885). Scott, *Cases*, 544.

nationality who were found guilty of the crime. When, however, in the opening decades of the nineteenth century the growth of public sentiment against the slave trade led several of the Great Powers to extend the legal definition of piracy so as to include the slave trade, two international problems were presented. Might the courts of a state apply the new statutory definition of piracy to acts committed on the high seas by the citizens of a second state when they had been arrested and brought to a port of the first state for trial? And, secondly, might the public vessels of a state visit and search vessels flying the flag of other states under circumstances raising the suspicion that they were engaged in the slave trade? In answer to the first question the British High Court of Admiralty, in a classic decision rendered in 1817 in the case of the French vessel *Le Louis*,[1] held that the fact that the municipal laws both of Great Britain and of France had made the slave trade unlawful did not constitute the act piracy at international law. Moreover, the right of visit and search, being a grave encroachment upon the equality and independence of states, could not be extended by implication to new cases not recognized by international law. Hence it followed that the resistance offered by the vessel to capture, and the circumstance of her being actually engaged in the slave traffic, could not be made a ground of condemnation. The position taken by the British court was made the basis of a similar decision by the United States Supreme Court in the case of the *Antelope*,[2] in which the court ordered the release of a Spanish vessel captured by an American cruiser, notwithstanding the fact that in 1820 Congress had passed an act declaring the slave trade to be piracy.[3]

International co-operation

The inadequacy of existing international law to meet the growing demand for the suppression of the slave trade led Great Britain, as chief protagonist, to bring the question before the Congress of Vienna in the hope of securing collective action on the part of the Great Powers. Eight of the powers signed a statement "declaring in the face of Europe that, regarding the univer-

[1] 2 Dodson, 210 (1817). Scott, *Cases*, 338.

[2] 10 Wheaton, 66 (1825). Scott, *Cases*, 9.

[3] "If," said Chief Justice Marshall, "we resort to this standard [usages, national acts, and general assent on the part of the leading nations] as the test of international law the question . . . is decided in favor of the legality of the trade. . . . As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it." The decisions in both these leading cases, the British and the American, contain oft-quoted dicta with regard to the equality of sovereign states. See above, pp. 134-135.

CHAP. XII

sal abolition of the trade in negroes as a measure particularly worthy of their attention," they were animated by a sincere desire to put a stop to it when the interests of their subjects permitted, and would negotiate later with regard to the time at which it should stop.[1] Efforts were made subsequently by Great Britain to secure a general agreement permitting a reciprocal right of search of ships suspected of slave trading; but several of the powers, including the United States, regarded the right of search as derogatory to their sovereignty and likely to have unfortunate consequences.[2] Great Britain then sought to conclude separate treaties with individual powers, and by 1850 had secured treaties with a large number of states, as well as a special treaty of 1841 with the five leading powers. The United States, however, refused to coöperate except by such police measures as did not involve the search of American vessels. To permit the right of search would, in the view of the United States, subject American commerce "to the risk of constant and harassing vexations."[3] The immunity of its merchant vessels on the high seas from detention or search by any other than American public vessels was regarded as an attribute of sovereignty which the United States could not abandon. When, however, Great Britain had given up the claim to a right of visit and search based upon customary law, the United States finally agreed, in 1862, to a treaty permitting a right of detention, search, and seizure within a restricted area off the coasts of Africa and Cuba.[4]

The convention of 1885

Coöperative action by the Great Powers as a body was not secured until the meeting of the Congress of Berlin in 1885, at the close of which fourteen states, including the United States, signed a convention pledging themselves "to strive for the suppression of slavery and especially of the negro slave trade," while the powers exercising sovereignty in the Congo declared that the Congo territories should not serve either as a market or as a way of transit for the slaves of any race; and they engaged severally to put an end to the commerce.[5] More definite and comprehensive

[1] Art. 118, No. 15, Final Act, June 9, 1815.
[2] Moore, *Digest*, II, § 310.
[3] Message of President Tyler, February 27, 1843. *Ibid.*, 930.
[4] It is instructive to observe the connection between the opposition of the United States to the visit and search of American vessels for the purpose of suppressing the slave trade and the earlier controversy with Great Britain over the visit and search of American vessels by British men-of-war with the object of impressing sailors of British birth into the service of the British navy. See *ibid.*, loc. cit. Also, Moore, *Principles of American Diplomacy*, Chap. III.
[5] Art. IX, treaty of February 26, 1885.

international legislation was, however, still needed, and in response to public agitation the same group of powers met at Brussels in 1889, and signed in 1890 a General Act providing for a limited right of visit and search, and for concerted police measures for the suppression of the traffic. At the same time it was agreed to create special consular courts for the investigation and trial of offenders and an international maritime bureau for the collection of information facilitating the repression of the trade within the defined zone.[1] In consequence of the enforcement of the provisions of this general convention, the slave trade by sea has now been practically extinguished. Punishment of the offense is still in the hands of the state whose flag has been used by the slave traders, but the criminal character of the offense is part of international statutory law.

[1] Malloy, *Treaties*, II, 1964.

CHAPTER XIII

THE EXTRADITION OF FUGITIVE CRIMINALS

a. Legal basis upon which extradition rests

In addition to the exceptions to the principle of the territorial independence of states which have been described in the preceding sections, there is a further exception in favor of the surrender by a state of its primary jurisdiction over the person of fugitive criminals who have sought asylum within its borders. Inasmuch as the laws of the state in which the crime was committed cannot operate beyond the territorial domain of that state, a mutual interest in the maintenance of law and order has led the nations to agree to surrender such fugitives from justice to the state in which the crime was committed. This surrender, in compliance with a formal demand, and in accordance with the conditions attached to the general obligation assumed in the treaty agreement, is known as "extradition."

As early as 1625 Grotius recognized the social necessity, and hence the *duty* under the natural law, that a state either punish such fugitive criminals itself or else surrender them to the state whose laws were immediately concerned in bringing the offender to justice.[1] This moral duty of extradition did not, however, become a legal obligation until states began to enter into special treaties providing for the surrender of particular fugitives, although apart from these treaty arrangements states frequently surrendered fugitives by voluntary act. The earlier treaties provided chiefly for the surrender of *political* fugitives; but by the time Vattel published his treatise in 1758,[2] ordinary criminals were also surrendered upon specific demand. In the second half of the nineteenth century the urgent need of offsetting the greater facilities for the escape of criminals provided by modern methods of transportation led to the conclusion of general treaties of extradition, covering stipulated crimes and applicable to any offenders; and by the opening decade of the twentieth century the scope of these treaties had widened greatly. Nevertheless bilateral treaty agreements continue to be the legal basis upon which extradition rests,

[1] *De Jure Belli et Pacis* (Eng. trans.), Bk. II, Chap. XXI, § IV.
[2] *Droit des Gens* (Eng. trans.), Bk. II, § 76.

and there is a noticeable lack of uniformity in their provisions and in their interpretation. The surrender of fugitive criminals in the absence of treaty provisions still takes place on occasion, but in such cases the act is one not of legal obligation, but of international comity.

b. Conditions attached to treaties of extradition: specified offenses

Since extradition is effected as the result of the provisions of treaties entered into by the nations two by two, it is impossible to formulate any general rule of international law upon the subject. It is, however, possible to bring together the provisions common to the treaties of the leading states, and to point out the more important conditions attached to the practice of extradition. The United States has concluded at different times some eighty-four treaties of extradition, which, in their wide variety, illustrate the common as well as the exceptional practice of nations. The list of offenses for which extradition will be granted includes not only the more serious crimes which are felonies at common law, but others which are either felonies by statute or merely misdemeanors. The treaty with France of 1909, replacing earlier treaties, includes such crimes as forgery, fraud by a guardian or trustee, perjury, kidnapping, and mutiny on the high seas. In general, the crime must be one with respect to which there is a general agreement among civilized nations as to definition,[1] the kind and amount of evidence to be adduced as proof, and the punishment assigned to the offense. Requests for the extradition of fugitive criminals are presented through the diplomatic representatives of the state resident in the foreign state.[2] Upon receiving the request the foreign government institutes a judicial investigation to determine whether there is sufficient evidence, in accordance with the local law, to warrant apprehension of the fugitive. If, as a result of this investigation, there is *prima facie* evidence of guilt, the fugitive is thereupon surrendered.[3] Pending the presentation of a formal request for extradition, application may be made by the foreign state by telegraph for the arrest and detention of a fugitive for a period not exceeding forty days.[4] Similar conditions appear to

[1] The specific offenses included in the general definition of a crime are, however, determined by the law of the place where the offense was committed. See Benson *v.* McMahon, 127 U. S., 457 (1888).

[2] The famous Savarkar case involved irregularities in the surrender of a prisoner who escaped from a British ship in a French port. See Scott, *Hague Court Reports*, 275; Stowell and Munro, *Cases*, I, 416.

[3] See Art. I, treaty of 1909 between the United States and France. Charles, *Treaties*, 33.

[4] *Ibid.*, Art. IV.

attend the process of extradition in the absence of treaty provisions. The variations in the attitude of certain states toward extradition are well illustrated in the case of one Nalbandian, who was indicted in 1910 for murder in Massachusetts and who was surrendered by Bulgaria, his native state, to which he had fled, although there was no treaty of extradition between the two countries. When, however, the agents of the State Department asked permission of Rumania for the transit of the prisoner through that country, the request was refused on the ground that, even though there had been a treaty of extradition between the United States and Rumania, the penalty for murder in the United States was death, and Rumania would have been obliged to require that the United States should not exact the death penalty.[1]

Necessity of trial for stipulated offenses

Since extradition under treaty can be effected only for one or another of the crimes enumerated in the treaty, it is further provided in more recent treaties that the person surrendered must not be tried for any crime, committed prior to extradition, other than the crime for which he was delivered up.[2] This condition is interpreted so literally as to exclude trial for a lesser offense included in the more serious one mentioned in the request for extradition. In the case of Winslow,[3] whose extradition was requested of Great Britain by the United States in 1876, the British Government inquired whether the United States would agree that the prisoner should be tried only for the specified crimes. The United States maintained that, in the absence of restrictive terms in the treaty of 1842, there was nothing to prohibit trial for another offense. As a result the prisoner was released, and the treaty was temporarily suspended. The justice of the British contention was sustained by the Supreme Court of the United States in the case of United States v. Rauscher,[4] decided in 1886, where the court ordered the release of a prisoner who had been extradited from Great Britain upon a charge of murder, but who had been tried in a lower court upon a charge of inflicting cruel and unusual punishment, the latter offense, however, not being specified as extraditable under the treaty.

Extradition of citizens

A further restriction frequently placed upon the practice of extradition is the condition that "neither of the contracting Parties

[1] Stowell and Munro, *International Cases*, I, 403-408.

[2] See, e.g., Art. VII, treaty of 1909 between the United States and France, Charles, *Treaties*, 33.

[3] Moore, *Digest*, IV, § 596.

[4] 199 U. S., 407. Scott, *Cases*, 405; Evans, *Cases*, 346.

shall be bound to deliver up its own citizens or subjects under the stipulations of this convention."[1] This condition, however, while it marks the general practice of states, is not exacted by Great Britain and the United States. Continental countries, such as Italy and France, maintain a system of criminal law in accordance with which a crime committed by one of their citizens in any part of the world is a crime against local law, and may be punished by the local tribunals if at any time the offender be found within the jurisdiction of the state. Hence it is possible for these states to bring to justice a fugitive criminal of their own nationality, without surrendering him to a foreign state for trial; and they do not consider it necessary to vindicate the law of the foreign state by trial in the place where the crime was committed. On the other hand, Great Britain and the United States, following the traditions of the common law, hold that crimes must be tried at the place where they are committed, and that their criminal courts have no jurisdiction over offenses committed outside the territorial boundaries of the state. Hence, if a fugitive criminal, one of their own citizens, should not be extradited, he would escape punishment altogether.

The chief difficulty in this connection arises from the lack of reciprocity between states following the common law and those following the civil law. In Charlton's case,[2] decided in 1913, the Supreme Court of the United States affirmed the judgment of a district court which had dismissed a petition for a writ of habeas corpus in behalf of an American citizen who had murdered his wife in Italy and had escaped to the United States. It was objected against the extradition of the prisoner that under the treaty with Italy neither party was bound to deliver up its own citizens, and that, inasmuch as Italy by domestic law forbade extradition of her own citizens, the treaty lacked mutuality and therefore, as regarded the case in question, had been abrogated. The court recognized that the lack of mutuality rendered the treaty voidable; but held that in view of the character of American criminal law the Department of State was entitled to recognize the treaty as binding. Charlton was thereupon extradited.[3]

[1] Art. V, treaty with France, 1909.

[2] Charlton *v.* Kelly, 229 U. S., 447 (1913). Scott, *Cases*, 415; Evans, 340.

[3] It is a point of domestic constitutional law in the United States that the executive department has no authority to surrender a fugitive criminal in the absence of a treaty with the particular foreign country. See Trimble's Case, Moore, *Extradition*, I, 166; *Digest*, IV, 301. In the Charlton case it was held

CHAP. XIII

Political offenses regularly excepted

The insertion in extradition treaties of the restrictions mentioned above is to be explained chiefly by the condition invariably attached in one form or another to these treaties, that "a fugitive criminal must not be surrendered if the offense in respect to which his surrender is demanded be of a political character."[1] This exception had its origin in the natural unwillingness of more democratic governments in the latter half of the nineteenth century to surrender political refugees whose offenses against established autocratic governments in many cases excited the sympathy of the country of their asylum. It has proved difficult, however, to draw a clear distinction between political and ordinary offenses. Are all attacks upon an established government political offenses, whether committed by liberals against an autocratic government, or by radicals against a liberal government? May the same act bear a different character if committed by an individual singly or as a member of a group? There are many cases in which political object and personal motive are inextricably tangled. Moreover, there are the so-called "relative political offenses," *délits complexes,* which are at the same time political acts and ordinary crimes. In the case of a Swiss refugee, Castioni,[2] who had taken part in an uprising against the local cantonal authorities and had killed a government official in an attack upon the municipal palace, the British court ordered the release of the prisoner on the ground that the offense was political. To exclude extradition under the terms of the act, said the court, it must at least be shown that the act was an overt one, done in the furtherance of a political rising, "a dispute between two parties in the state as to which is to have the government in its hands." In contrast with this decision, the same British court rendered an opinion in 1894,[3] delivering up to France the anarchist, Meunier, who had caused the explosion of a bomb in a Paris café and another explosion in a government barracks. The court repeated the principle that "in order to constitute an offense of a political character, there must be two or more parties in the state, each seeking to impose the government of their own choice on the other." The party with whom the accused is identified, said the court, "is the enemy of

that the lack of reciprocity on the particular point of the extradition of nationals did not operate to deprive the President of his authority under the treaty.

[1] Art. VI, treaty of 1909 with France.

[2] Q. B. Div., 149 (1891). Scott, *Cases,* 420; Evans, 352.

[3] 2 Q. B. Div., 415. Scott, *Cases,* 427.

all governments. Their efforts are directed primarily against the general body of citizens."

Limitation of political offenses

The sympathy of liberal governments with political refugees received a sharp check as the result of the numerous assassinations of rulers during the second half of the nineteenth century. Murder committed in the course of a political uprising was obviously different from the futile murder of the head of a state by an irresponsible individual. In 1856, in the presence of the inability of the Belgian court to extradite Jacquin, who had attempted to murder Napoleon III, Belgium enacted the so-called *attentat* clause, providing that the murder of the head of a foreign state, or of a member of his family, should not be considered a political crime. Following the assassination of President Garfield, the United States incorporated into its treaty with Belgium in 1882 the clause that "an attempt against the life of the head of a foreign government, or against that of any member of his family, when such attempt comprises the act either of murder or assassination or of poisoning, shall not be considered a political offense or an act connected with such an offense."[1] The same clause appears in the treaty of 1893 with Russia. It does not appear, however, in the more recent treaty of 1909 with France.[2]

c. Need of a uniform rule

In view of the unsatisfactory state of the law with respect to political crimes, several attempts have been made to formulate a uniform rule for general adoption. In 1880 the Institute of International Law adopted at Oxford a series of twenty-six rules governing the whole subject of extradition, three articles of which (Art. 13-15) related to political offenses.[3] These last were modified at the meeting at Geneva in 1892, when four new articles were adopted.[4] Extradition was held to be inadmissible not only for purely political crimes, but also for acts of a mixed character called "relative political offenses," except where the crime was one "of great gravity from the point of view of morality and of common law." Acts committed in the course of insurrection or civil war were not extraditable unless they were "acts of odious

[1] Malloy, *Treaties*, I, 100.

[2] It is suggested that such cases can best be decided upon their individual merits, provided the decision be left not to the executive department of the government in which the offender has taken refuge, but to the judicial tribunals whose traditions give promise of greater consistency and impartiality in their decisions. For a recent case of extradition involving an alleged political offense, see W. Mettgenberg, "The Extradition of the Assassins of the Spanish Premier Dato by the German Reich," *Am. Journal*, XVI (1922), 542.

[3] *Resolutions*, 42.

[4] *Ibid.*, 102.

CHAP. XIII

barbarity or vandalism forbidden by the laws of war," and then only when the civil war was at an end. An important exception was made of "criminal acts directed against the bases of all social organization, and not only against a certain state or a certain form of government," which were not to be considered political offenses. This last provision has been criticized by Lawrence, who points out that, in the social as well as in the political sphere, "there is need for distinction between the reformer who is merged in the criminal and the criminal who is merged in the reformer." [1] Oppenheim is reluctant to have the general principle of the non-extradition of political offenders abandoned, as advocated by some writers, and believes that the Swiss law of 1892, providing for the verdict of the highest federal court upon each case of complex political crime, best meets the situation.[2]

d. Attempted extradition of the German kaiser

A unique extradition case for which there was no precedent in international law was presented on January 15, 1920, when the Supreme Council, representing the Allied and Associated Powers, addressed an official demand to the Government of Holland calling upon it "to deliver into their hands William of Hohenzollern, former emperor of Germany, in order that he may be put on trial." The demand for extradition had its origin in Article 227 of the Treaty of Versailles, which stated that "the Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offense against international morality and the sanctity of treaties." Provision was made for a special tribunal to try the accused. In its decision the tribunal was to be "guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality." A request for the surrender of the emperor was to be addressed to the Government of Holland. By the terms of the treaty the offense for which the kaiser was to be extradited was recognized as involving international morality rather than international law proper.[3] This was necessary because there was clearly no criminal law covering the case, whatever the character of the offense as judged by the standards of common morality.[4]

[1] *Principles of International Law*, 5th ed., 266.
[2] *International Law*, I, § 339.
[3] The offense attributed to the kaiser has been spoken of as a "political" one, but it must be distinguished from the "political offenses" referred to in existing extradition treaties. The term "moral" seems best to describe a crime not defined by any existing law.
[4] See above, p. 145.

In its reply the Dutch Government called attention to the fact that Holland was not a party to the Treaty of Versailles, and that in consequence the case must be judged by the municipal law of the state and its national traditions. The decision reached was that neither "the constituent laws of the kingdom, which are based upon the principles of law universally recognized, nor the age-long tradition which has made this country always a ground of refuge for the vanquished in international conflicts," permitted the government of Holland to accede to the request made upon it.[1] A second effort was made on February 14 to bring pressure upon the Dutch Government; but an equally definite answer was returned. The most that Holland would promise was that "in the free exercise of Dutch sovereignty" it would take all necessary effective measures of precaution to prevent the return of the kaiser to Germany, and would subject his freedom to the necessary restrictions to accomplish that object.[2]

e. Possibility of a general international convention

It is a question whether the subject of extradition as a whole is ripe for regulation by a general international convention. That such a convention would present many advantages as against the present system of separate treaties is apparent. A single agreement would replace the two thousand or more treaties now required to meet the international need. Comparison might profitably be made in this respect with the single clause of the United States Constitution (Art. IV, Sec. 2, Clause 2) which reads: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." In the case of "interstate rendition" between the States of the American Union, there is no method of coercing the individual State to live up to its prescribed legal duty, so that discretion may be exercised by the executive of the State in which the criminal has taken refuge.[3] On the other hand, the criminal, when delivered up, may be tried for crimes other than those mentioned in the demand for extradition.

[1] *New York Times*, January 22, 1920.

[2] A summary of the facts, and argument upon them, may be found in "The Trial of the Kaiser" by James Brown Scott, in *What Really Happened at Paris*, ed. by E. M. House and C. Seymour.

[3] The leading case is Kentucky *v.* Dennison, 24 Howard, 66 (1860), in which the Supreme Court refused to issue a writ of mandamus to compel the governor of Ohio to surrender a fugitive who had violated the law of Kentucky against assisting a slave to escape.

The American system, however, assumes a degree of mutual confidence in the respective judicial institutions of the several States which does not at present exist between the nations as a body. Should a general international convention be adopted, it would doubtless be necessary to leave considerable latitude in respect to the return of fugitives who are citizens of the state of refuge, and in respect to the return of political offenders.[1] As an example of the possibilities of a general international treaty reference may be made to the extradition convention between the Central American republics, concluded in 1923, renewing an earlier treaty of 1907. While the treaty contains the customary limitations upon the surrender of fugitives found in bilateral treaties, the enumeration of specific extraditable offenses is omitted and the effective punishment of nationals not surrendered is provided for.[2]

[1] The removal of the first of these limitations would appear to depend upon the growth of a more uniform system of criminal law and a moderation of the present exaggerated sense of the protection due from a state to its citizens; the second promises to disappear with the development of constitutional governments.

[2] For the text of the treaty, see *Am. Journal*, Supp. XVII (1923), 76.

CHAPTER XIV

THE RIGHT OF INDEPENDENCE: JURISDICTION OVER TERRITORY

a. Jurisdiction over territory as distinct from persons

For purposes of scientific treatment the jurisdiction of a state over the persons within its territory may be distinguished from the jurisdiction of the state over the territory itself. As a practical matter the two forms of state authority, or the two methods by which the state gives effect to its right of independence, are on many points legally indistinguishable. Both the citizen body and the territorial domain of the state are essential elements of its corporate character. The membership of the former is, in general, determined by the fixed boundaries of the latter. The exercise of effective control over individual citizens is dependent upon their presence upon the territory of the state. Aliens who owe no formal allegiance to the state come under the authority of its laws by entering within its physical limits. Jurisdiction over persons, therefore, necessarily raises the collateral question of jurisdiction over territory, whether the connection between the two be close or remote. Nevertheless it is a convenient and not wholly arbitrary rule of international jurisprudence to regard the territory of the state as something distinct from the state itself, and to treat it as if it were national property possessed by the state in much the same way that property in land is held by individual citizens within the state.

Nature of territorial jurisdiction

The jurisdiction of a state over its territory must, as a matter of constitutional law, be distinguished from property rights in the land itself. In feudal times the exercise of sovereignty was coincident with the ultimate ownership by the king of the land included within the boundaries of the state. The sovereignty of the king thus implied a property right in the land as well as a personal right to the allegiance of the tenant.[1] In modern times the state appears as a corporate person distinct from the person of

[1] Vattel thought it necessary even in his day to denounce the views of certain writers who regarded the prince as the real owner (*propriétaire*) of the empire, and in whose eyes "the kingdom is the inheritance of the prince, in the same manner as his fields and his flocks." *Law of Nations* (Eng. trans.), I, § 61.

CHAP. XIV

its ruler; it possesses an ultimate authority within its territorial borders without being the actual owner of the land itself. It may, indeed, own definite portions of the territory in its capacity as a public corporation, in which case it exercises over the particular area both territorial jurisdiction and the rights of private ownership. Or again the state may possess a right of eminent domain by which it has the power to withdraw a given area of land from private use for purposes of state. But these are exceptional cases, leaving the general rule intact, that the territorial jurisdiction of the state is, in point of constitutional law, a right of political control, of ultimate authority, not a right of property. It is an *imperium* as distinct from a *dominium* in the sense of Roman law.[1]

Sovereignty and ownership

This distinction has, however, not yet been fully recognized by international law. The reason is twofold. In the first place, international law deals only with the relations of states, and does not take cognizance of the constitutional relations between the individual state and its citizens except in so far as these are indirectly presented in connection with claims asserted by the state itself. Since the members of the state are not recognized by international law in their individual capacity, any rights which belong to them must, as Hall expresses it, "be clothed in the garb of state rights before they can be put forward internationally."[2] When, therefore, a state asserts its right to sovereignty over a disputed area of territory the claim differs in no appreciable way from the assertion of a right of complete ownership, and its merits are determined by the same rules of law, whether the state does or does not happen to be the actual owner of the land from the point of view of constitutional law.[3]

In the second place, owing to the fact that at the time Grotius wrote the conception of the sovereignty of the state as distinct from the ownership of the property of the state was not clearly understood, it seemed both logical and convenient to transfer to international law the traditional rules of the Roman law with regard to the rights of property between individuals. These rules remain to this day the basis of the territorial rights of states, in spite of the fact that many of them are applied with difficulty to

[1] See Oppenheim, *International Law*, I, § 108.

[2] *International Law*, § 9.

[3] The analogy of trust estates under municipal law may be helpful. The state is the legal owner at international law, holding title as trustee for its individual citizens.

the concrete situations of international life. The attempt, for example, to apply the rules of the Roman law to international problems, such as the acquisition of unoccupied territory in the New World, led to numerous disputes, for the solution of which the principles of the Roman law were entirely inadequate.[1] It will be profitable, therefore, both for the sake of a clear understanding of the facts of the law and for an appreciation of the law's intrinsic character, to make comparison on occasion between the property rights of individuals under municipal law and the parallel rights of states under international law.

b. Acquisition of title to territory

Title to its territorial domain may be obtained by a state either through the acquisition of land not hitherto belonging to any other state or through the transfer of land from one state owner to another.[2] The former method confers an original title, the latter a derivative title. International jurisprudence is undecided as to the number and character of the titles to property, but in actual practice five titles appear to be recognized by states: occupation, accretion, prescription, cession, conquest.

Title by occupation

Occupation is both in legal theory and in practical usage the most important mode of acquiring territory as between states. Grotius referred to it as "the only natural and original mode of acquisition."[3] To him, as to Vattel,[4] occupation represented a tacit form of agreement by which the division of lands among the peoples of the earth was brought about, once they came to realize that their original common ownership was inadequate to meet their needs. Thus arose the rights of property between nations, which in the due course of time became absolute by prescription. This theory, however, of the primitive settlement of states is only of academic interest at the present day. Occupation as a title to territory obtained its important place in international law in connection with the claims of existing European states to acquisitions of territory in the New World opened up by explorers after the discovery of the American continent in the fifteenth century; and it continued to be an acute issue until the definitive partition of Africa toward the close of the nineteenth century. The prob-

[1] See Oppenheim, *International Law*, I, § 210.

[2] The term "title" has long been in use by statesmen and writers to describe rights or legal claims to territory. See, e.g., Moore, *Digest*, I, §§ 80, 81. The student of jurisprudence should note the more restricted use of the term in private law.

[3] *De Jure Belli et Pacis* (Eng. trans.), Bk. II, Chap. III, § IV; Chap. II, § II, V.

[4] *Droit des Gens* (Eng. trans.), Bk. I, § 207.

CHAP. XIV

lem presented was, Upon what grounds might the claims put forward by European states to the ownership of territory in unoccupied lands be adjudged valid? The question raised issues both as to the law and as to the facts, and in both respects there was ample ground for controversy. For the law was in the making, and it had no more than the opinions of jurists behind it; while the facts were often difficult to ascertain, even where there was a desire for justice on both sides.

Discovery does not give valid title

Not until the eighteenth century did discovery as a basis of title to unappropriated lands cease to be asserted as sufficient of itself to give validity. The two preceding centuries, being an age of discovery, furnish numerous instances of claims based upon nothing more than the fact that a single navigator landed upon the soil and in the name of his sovereign "took possession" of it. Extravagant claims met, however, with equally sweeping denials. The famous bull, *Inter Caetera,* issued by Alexander VI May 4, 1493, suggesting a division of the New World between Spain and Portugal by a line drawn one hundred leagues west of the Azores and Cape Verde Islands,[1] was not taken seriously by the competitors of the two favored states. Spain, England, and France each claimed the coast of America, north of the Gulf of Mexico, on the basis of first discovery by a vessel flying their national flag.[2] By the time of Vattel the rule appears to have been recognized that mere discovery could give no more than a temporary inchoate title, which would lapse unless followed within reasonable time by an effective possession. "Navigators," said Vattel, "setting out upon voyages of discovery and bearing with them a commission from their sovereign, when coming across islands or other uninhabited lands, have taken possession of them in the name of their nation; and this title has usually been respected, provided actual possession has followed shortly after."[3] In a case before the Supreme Court of the United

[1] The bull marking off the line of demarcation was withdrawn the same year in favor of another which left the parties to their original rights. A treaty was thereupon concluded between them, June 7, 1494, moving the line to three hundred and seventy leagues west of the Cape Verde islands. See *Cambridge Modern History,* I, 23-24; Hyde, *Int. Law,* I, 165, n. 1. For the text of the bull, see Davenport, *European Treaties Bearing on the History of the United States and its Dependencies to 1648.*

[2] In the charter given by the British Crown to the London Company in 1609 the grant of land was made to extend "up into the land, throughout from sea to sea, west and northwest," beyond the limits of known discovery. A similar grant of territory without known limits was made in the charter obtained by the Plymouth Company in 1620. MacDonald, *Select Charters,* 11, 23.

[3] *Law of Nations* (Eng. trans.), I, § 207.

States in 1828, Chief Justice Marshall doubtless went too far in declaring that "discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments."[1] He entered, however, the qualification that the "title might be consummated by possession."

Conditions of occupation

By occupation, in international law, is meant the settlement by a state of territory hitherto unappropriated, with the object of incorporating the territory into the national domain and exercising sovereignty over it. The territory thus appropriated must be, in law, *res nullius*, which is interpreted as requiring not that the territory be uninhabited, but that it be not already occupied by a people or state whose political organization is such as to cause its prior rights of occupancy to be recognized. No clear line has been drawn by international law between the civilized and uncivilized peoples whose prior sovereignty will or will not be recognized under the circumstances. But, in general, international law has not recognized the title of wandering tribes or even of settled peoples whose civilization has been regarded as below the European standard. Vattel's theoretical justification may be open to question, but he correctly stated the law when he said that the uncertain occupancy by wandering tribes of the vast regions of the New World "cannot be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them."[2] In the case of Johnson and Graham's Lessee *v.* McIntosh,[3] the Supreme Court of the United States was presented with a claim to land, based upon grants made by certain Indian tribes, which conflicted with the claims of Virginia under her charter of 1609. The court held that such rights as were possessed by the Indians at the time of their grant were no more than rights of occupancy left in their enjoyment after the discovery and annexation of the territory by the British Crown. "While the different nations of Europe respected the rights of the natives, as occupants," said the court, "they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in

[1] Johnson and Graham's Lessee *v.* McIntosh, 8 Wheaton, 543 (1823). Below, p. 223.

[2] *Law of Nations* (Eng. trans.), I, § 209.

[3] 8 Wheaton, 543 (1823). Scott, *Cases*, 175; Evans, 281.

CHAP. XIV

possession of the natives.'' The court found no difficulty in conceding a like validity to similar titles of Holland and of Portugal, as well as to that of Spain in respect to Mexico, in spite of the superior civilization of the Aztec natives.

Necessity of actual settlement

In addition to a formal expression of the intention of a state to take possession of unappropriated territory, there must be an actual settlement upon the land if the inchoate title conferred by discovery is to be made final and definitive so as to secure the respect of other states. The particular form which the settlement must take to keep alive the title asserted by the state was obviously in the early days a matter too dependent upon local conditions to make possible the development of a definite rule. Considerable time was allowed to elapse between the formal act of annexation and actual establishment of military garrisons or colonies. The long period between the annexation of North America to the British Crown and the founding of the Virginia and New England colonies would have invalidated the title in a later century. Likewise the temporary abandonment of a settlement was judged more leniently in the seventeenth century, owing to the greater difficulty attending colonial establishments. The dispute between the United States and Spain to determine the boundary between the newly acquired Louisiana Territory and the Spanish possessions in Mexico is illustrative of the conditions under which an accepted principle of law had to be applied to uncertain facts. The United States, as successor to the French title, claimed the Rio Grande as the western boundary on the ground of a French settlement in the Bay of Espíritu Santo in 1685. Spain claimed title by prior discovery of the coast of Texas in the sixteenth century, followed by a permanent settlement on the coast in 1689 after the French settlement had been abandoned.[1] Under the circumstances, a decision on the legal rights of the parties would have been impossible, although the claim of Spain appears to have been the better founded. As part of the price for the purchase of East Florida in 1819 the United States abandoned its claim.[2]

Loss of title by abandonment of territory

The case of the Falkland Islands presented difficulties as to both the law and the facts. Both Spain and Great Britain asserted title by discovery, the former through Vespucius, the latter through Drake and Hawkins. The first settlement appears to have

[1] For further details, see Hall, *International Law*, § 33.

[2] Art. III, treaty of February 22, 1819; Malloy, *Treaties*, II, 1651. See also Hill, *Leading American Treaties*, Chap. VIII.

been made in the name of France in 1764, whose rights were transferred to Spain in 1767. In the meantime formal possession was taken of the islands in the name of Great Britain in 1765. In 1771 the islands were left by Spain in British possession without a reservation as to the right of sovereignty. Three years later the British, in turn, withdrew their forces, after leaving "marks and signals" of possession. Occupation by Spain ensued until 1810, followed by occupation by the Government of Buenos Aires until the latter withdrew under pressure from the British in 1833, since which time the British have acquired by prescription what is doubtless a permanent title.[1] Whether Great Britain might justly claim to hold title to the islands during the long period of their abandonment, in the presence of an actual occupation by Spain, is a question to which international law neither of that time nor even of the present day can give a clear answer. A further instance of such loss of title is to be seen in the abandonment of the island of Santa Lucia in the Caribbean by the British in 1640. This island was occupied by the French in 1650, and was claimed by them as unappropriated territory.[2] In 1875 the French Government, as arbitrator between Great Britain and Portugal, assigned to the latter country certain territory in Delagoa Bay which had been occupied by Portugal intermittently since the sixteenth century, but which had been abandoned temporarily in 1823, at which time the native chiefs asserted their independence and ceded the lands to Great Britain.[3]

Extent of the area of occupation

The chief ground of international dispute in connection with the occupation of unappropriated territory has been to determine how far a settlement upon the outer fringe of annexed territory should be regarded as the possession required to confirm title to the whole.[4] Obviously it was not possible in most cases for states to do more than establish settlements at one point or another along the sea-coasts of a continent or large island. Yet for the future protection of their settlements, as well as for their subsequent expansion, it was necessary that large stretches of inland territory

[1] For a summary of the evidence of the case, see Stowell and Munro, *Cases*, I, 208 ff.; Moore, *Digest*, I, § 171.

[2] Hall, *International Law*, § 34.

[3] See Hall, *International Law*, § 34. For the text of the award, see Moore, *Arbitrations*, V, 4984.

[4] The problem has no analogies in municipal law, under which actual possession is a prerequisite of such titles as "squatter's rights." Compare, however, the "staking out" of claims, where land is granted by a government to new settlers.

CHAP. XIV

should be brought within the control of the same state. Mention has been made of the claims indirectly made by the British Crown in the charters granted in 1609 and 1620 to the London and Plymouth Companies to the inland territory "from sea to sea."[1] By the eighteenth century these sweeping claims were reduced to narrower limits, and Great Britain was content in 1765, though its self-restraint was not followed later by the United States,[2] to accept the Mississippi River as a western boundary.

The Oregon boundary dispute

The crest of the water-shed came to be regarded as a natural inland boundary, so as to include, together with the land actually settled, the basins of the smaller rivers emptying along the coast. Such was the claim pressed by the United States against Spain in 1805 in connection with the boundaries of the Louisiana Purchase.[3] If, however, a river extended far back into the land, including, together with its branches, a wide area of unsettled territory, the question whether a settlement on the coast at the mouth of the river should give title to the entire basin was more doubtful. In the long controversy between Great Britain and the United States over the Oregon boundary the United States claimed the territory lying between 42° and 54° 40′, north latitude, on the ground of prior discovery and prior settlement, as well as on the ground of succession to Spanish rights by discovery. Great Britain denied both claims on point of fact. On the point of law, the two countries differed as to the doctrines of "continuity" and "contiguity." The United States was undoubtedly without justification in law in claiming, as heir to British claims, territory "extending westward from her settlements (on the Atlantic) to the Pacific Ocean."[4] Nor can a valid defense be made for the claim to the entire region drained by the Columbia river, which in its many branches extended far into the interior and embraced territory in no sense necessary to the protection of the settlements at the mouth of the river. In truth, existing legal principles were quite inadequate to settle the claims made by either side; so that the compromise upon the line of 49°, laid down in the treaty of 1846, must be looked upon as an "amicable composition" of a dispute which no international court could have settled on a basis of strict law.[5] Beyond the rule that occupation should extend as far as it was actually made effec-

[1] See above, p. 222, n. 2.
[2] See below, p. 226.
[3] See Moore, *Digest*, I, § 81.
[4] See *ibid.*, where the claims of Secretary Calhoun in 1844 are given.
[5] For the text of the Oregon Treaty, see Malloy, *Treaties*, I, 656. The final settlement of the controversy may be found in Moore, *Arbitrations*, I, 196 ff.

tive, it was impossible for international law to go; the "constructive occupation" of territory not actually occupied presented facts too uncertain for customary law to act upon.

Later law of occupation

But the time of the partition of Africa in the last quarter of the nineteenth century new principles of law came to the front. International law, in general, had grown greatly within the century preceding, and the nations were on the whole more desirous of making their colonial undertakings conform to accepted law. The old formalities attending discovery and annexation gave way to a definite notification by the occupying power of its intention to take over the territory. Article 34 of the Final Act of the Berlin Conference of 1885 [1] provided that any power which should thenceforth take possession of territory upon the coasts of the African continent should accompany the act "with a notification addressed to the other signatory Powers of the present Act," in order that they might, if need be, make good any claims of their own. In addition to the necessity of confirming by occupation and settlement the inchoate title acquired by notification of intention to occupy, it was now required that the power taking possession of territory should set up a local government capable of maintaining order. Article 35 of the Berlin convention imposed upon the signatory powers the obligation to assure in their territories "the existence of an authority sufficient to cause acquired rights to be respected, and as the case may be, liberty of commerce and of transit under the conditions agreed upon." [2] The provisions of the Berlin convention showed the desirability of formulating a general rule of international law upon the subject. In consequence, the question was taken up by the Institute of International Law, which offered in 1888 a "Draft of an International Declaration Regarding Occupation of Territories." The Draft proposed that the taking of possession should be carried out "by the establishment of a responsible local power, provided with sufficient means to maintain order and assure the regular exercise of its authority within the limits of the occupied territory." It was further proposed that, in the notification given of taking possession, a statement should be made of the approximate limits of the occupied territory.[3]

[1] See above, p. 27.

[2] The provisions of the Berlin convention relating to the administration of the territories of central Africa in the interest of the welfare of the native tribes may be studied in connection with the system of mandates established by the Covenant of the League of Nations. Above, p. 100.

[3] *Resolutions*, 86.

CHAP. XIV

Colonial protectorates

A characteristic feature of the occupation of the African continent was the large number of agreements entered into with the native chiefs by states seeking to obtain a prior right of control over territory which at the time they were unable to occupy effectively. These treaties are not, however, to be classed as agreements with independent states having international validity. They were rather administrative acts on the part of the European power, having for their object to disguise the ultimate intention of obtaining sovereign control over the territory. In this way it was possible to overcome more easily the opposition of the natives, and at the same time to serve notice upon other powers that the territories in question were already in process of being occupied.[1] The "colonial protectorates" thus set up gave no international status to the native tribes, and in consequence the violation of the agreements made no appeal to third states not interested in contesting the title to the territory in question.[2] It would appear, however, that these protectorates mark an advance over the earlier practice recorded in Johnson *v.* McIntosh,[3] which denied to the native inhabitants not merely sovereignty over the territory they occupied, but even rights of private property in the soil. They recognized at least a rudimentary sovereignty on the part of the native tribes, and they have tended, as a matter of domestic constitutional, if not of international, law, to put some restraint upon the exploitation of backward peoples.[4]

Delimitation of the hinterland

Mindful, doubtless, of the difficulties experienced on the American continent in delimiting the area of occupation, the European powers interested in acquiring territory in Africa found it desirable to enter into separate conventions, marking off the frontiers of their respective claims and stipulating that within the defined areas each should respect the exclusive rights of the other. These zones of territory, more or less contiguous to actual settlements

[1] In its constructive proposals adopted in 1888 the Institute of International Law recommended (Art. 2) that the same rules with respect to notification and local administration adopted for territory formally occupied should be made applicable to these protectorates as well. *Resolutions*, 86.

[2] To be distinguished from "colonial protectorates" are the protectorates in which the native ruler is left in the exercise of a limited sovereignty subject to the guardianship, particularly in foreign affairs, of the protecting state. See above, p. 97.

[3] See above, p. 223.

[4] The student of American constitutional law may make comparison between these agreements and the succession of treaties entered into by the United States Government with the several Indian tribes during the gradual westward progress of the settlement of the country. See Snow, *The Question of Aborigines*, Chap. III.

along the coast, were designated as "hinterland," and, inasmuch as they were not "occupied" in the technical sense, they came to be spoken of as "spheres of influence" or "spheres of interest."[1] In the treaty of 1886 between Great Britain and Germany each state engaged not to make acquisitions of territory, or to accept protectorates, on the one or the other side of the conventional line adopted in the hinterland of the western coast.[2] A second convention, entered into in 1890, delimited the frontiers of the hinterland of the eastern coast.[3] In 1890 a dispute broke out between Portugal and Great Britain as the result of an endeavor on the part of the former to link together its eastern and its western African possessions. Claim was made to the territory adjoining Portuguese East Africa on the ground of cession from a native chief and of effective occupation, and to the adjoining western territory on the ground of prior discovery and the doctrine of "contiguity." Great Britain contested the claim on the basis of the exploration of the British South Africa Company, and the matter was finally adjusted by the treaty of 1891, leaving the disputed territory in the hands of Great Britain.[4] By the close of the nineteenth century bilateral agreements between Great Britain, France, Italy, Germany, and Portugal had definitely settled the interior boundaries of their respective colonial possessions. It should be observed, however, that these treaties were legally binding only upon the parties to them, third states being free to set up separate claims to the particular territory. In the course of time the acquiescence of third states was to be implied, while acts of effective occupation have now come to confirm title by the rules of customary law.

c. Title by accretion

Accretion as a mode of acquiring title to territory is of ancient lineage, but of little practical consequence. It may be defined as the slow addition made to land by the action of rivers flowing past it or by the action of the ocean on the coast. The rules which govern it were taken from the Roman law by Grotius[5] and his followers, and have remained practically unmodified to this day.

[1] These "spheres of influence" or "spheres of interest," which look to an ultimate annexation of the territory thus marked off, are to be distinguished from such spheres of influence as were defined by Great Britain and Russia in the treaty of 1907 for their respective exploitations in Persia. See below, p. 312. In the latter case the object was more economic than political, and apparently did not contemplate ultimate annexation.

[2] See Westlake, *International Law*, 2nd ed., I, 130.

[3] Bonfils, *Droit International*, § 559.

[4] *Ibid.*, § 560.

[5] See *De Jure Belli et Pacis* (Eng. trans.), Bk. II, Chap. VIII.

CHAP. XIV

The principle of *accessio cedat principali,* the thing that is added to another follows the fortune of the principal thing, governs all the different forms which accretion takes. The addition may take the form of alluvion, which is the imperceptible increase which the material deposited by the waters of a river or by the ocean adds to the banks or shores. It may also take the form of deltas, which are triangular islands built up at the mouth of a river by the gradual deposit of silt; or again, it may take the form of islands built up in the bed of a river. In each case the addition becomes the property of the owner of the mainland, though a difficulty may arise where the river forms the boundary between two states.[1]

Where islands are built up within the maritime belt of a state they have the effect of extending the maritime belt to an equal distance beyond the newly acquired territory, with corresponding extension of the jurisdiction of the state. This rule was applied by the British Court of Admiralty in the decision of the case of the *Anna,*[2] a Spanish vessel captured by a British privateer near the mouth of the Mississippi River during the war between the two countries in 1805. The question presented to the court was whether the capture had been made within the territorial jurisdiction of the United States. The capture had been made outside the three-mile limit if measured from the Balise, a fort on the extreme point of the mainland, but within the maritime belt if measured from some little mud islands composed of earth and of driftwood "which form a kind of portico to the main-land." The court was of the opinion "that the right of territory is to be reckoned from those islands."

d. Title by prescription

Prescription in international law may be defined as the acquisition of territory by an adverse holding continued through a long term of years. It presumes the existence, at least in theory, of an earlier title held by another. If the earlier title is an uncertain one, the adverse holding may be *bona fide* in its origin; if it is clear and definite, the adverse holding will be *mala fide* in its origin. In both cases the new title is acquired on the ground of a presumed abandonment of the territory by the original owner. Prescription in international law, as supported by Grotius and writers of the Grotian tradition, differs from the usucaption and prescription of the Roman law in having no fixed period at the end of which the title of the original holder may be presumed to have been aban-

[1] See below, p. 248.

[2] 5 C. Rob., 373 (1805). Scott, *Cases,* 195; Evans, 148.

doned. Grotius had in mind uninterrupted possession "going beyond memory,"[1] whereas Vattel was ready to recognize adverse possession as giving title if the owner had neglected his right or been silent about it during "a considerable number of years."[2] The question of the time required to create a presumption of abandonment presented serious difficulties in the eighteenth century, and Vattel was so conscious of them that he laid stress upon the great advantage it would be "if neighboring nations would come to an agreement on the subject by means of treaties."[3] Other writers deny altogether the possibility of acquiring title by prescription;[4] but in so doing they would appear not to be stating law, but to be defending morality against the facts of international life. There is, further, the academic question whether prescription is an original or a derivative mode of acquisition, some writers classifying it as derivative, on the ground that it is a title to property which previously belonged to another, others classifying it as an original mode of acquisition, on the ground that title is not derived from the former owner directly, but from certain facts created by the presumed abandonment of the territory by the former owner.[5] The bearing of the question upon the realities of international life will appear presently.

Part played by prescription in international law

There can be no doubt that from one point of view the recognition of title by prescription is as important in international law as it is in the municipal law of the several states. Grotius saw clearly that if controversies concerning kingdoms and their boundaries were not extinguished by lapse of time wars would be perpetuated, and therefore that it was "for the good of human society that governments should at some time be placed beyond the risk and doubt of controversy."[6] Vattel became eloquent upon the necessity "for the sake of the peace and welfare of the human race . . . that sovereigns be not easily troubled in their possession and that after a great number of years, if their title has not been contested during all that time, it should be regarded as valid and indefeasible."[7] The Supreme Court of the United States, apply-

[1] *De Jure Belli et Pacis* (Eng. trans.), Bk. II, Chap. IV, §§ I, VII, IX.
[2] *Law of Nations* (Eng. trans.), Bk. II, § 142.
[3] *Ibid.*, § 151.
[4] Notably among the older writers, G. F. von Martens, *Précis du Droit des Gens*, §§ 70-71, and among the more recent, von Ullmann, *Völkerrecht*, § 92.
[5] The student of the common law may make comparison with the legal fiction invented by English jurists that a title by prescription to incorporeal hereditaments rested upon an original grant.
[6] Bk. II, Chap. IV, § VIII.
[7] Bk. II, § 147.

CHAP. XIV

ing international law to a dispute between Rhode Island and Massachusetts, laid it down that "for the security of rights, whether of states or of individuals, long possession under a claim of title is protected." [1]

Had prescription been limited to territory held in distant and hitherto unoccupied parts of the world where the original title was doubtful, title acquired by prescription might have been permitted to obtain legal validity without debate of any consequence. When, however, prescription was put forth as a desirable means of securing stability in international affairs by putting an end to the claims of a dismembered state, such as Poland, or by confirming the title of, for example, Austria to its Italian possessions, or the title of France to Alsace-Lorraine before 1870, it was met by an indignant denial, and it found itself confronted with the new doctrine of nationality, which swept aside old titles in international law with the same revolutionary hand that had swept aside the existing titles to land in France in 1793. Long continued possession by a powerful state seemed no ground of title to subject peoples whose silent acquiescence in their dispossession had been due chiefly to fear of contesting the will of a stronger power. It would appear, therefore, that prescription in international law could only play the effective part of quieting possession that it has played in municipal law, provided there were in existence a higher authority, having jurisdiction over such cases, to which the dispossessed party could make appeal. In the absence of such an authority, time might do no more than mark the perpetuation of injustice.

e. Title by cession.

Title by cession in international law corresponds in a general way to title by deed of transfer in municipal law. Cession may be defined as the formal transfer from one state to another of the sovereignty over a definite area of territory. It is usually carried out by means of a treaty between the two parties, defining the territory to be transferred and fixing the conditions under which the transfer is to take place. These conditions vary widely, and they may include such matters as the status of the inhabitants of territory under the sovereignty of the new owner, the adjustment of the public debt of the ceded territory, the creation of servitudes upon the territory in favor of the ceding state, and other like stipulations. Whether these conditions are to be regarded as per-

[1] 4 Howard, 591, 639 (1846). See also Virginia *v.* Tennessee, 148 U. S., 503 (1893). Scott, *Cases*, 252. In the above cases the doctrine of prescription was applied to boundaries originally fixed by agreement, but subsequently giving rise to question as to their validity.

sonal obligations assumed by the assignee state, or as covenants running with the land, following the distinction made by the common law, is of only incidental interest in international law, since there is no difference of procedure for a suit *in rem* and a suit *in personam*. It is important, moreover, not to confuse the international law of cession with the provisions of the domestic constitutional law of the assignor or of the assignee state. As far as international law was concerned it was, for example, a point of no consequence whether the acquisition of the Philippines and of Porto Rico by the United States brought those territories under the protection of the law of the Constitution.[1] International law recognized the transfer of sovereignty; constitutional law determined whether the new territory should or should not enjoy certain constitutional privileges.

Forms of cession

The treaty by which transfer of sovereignty is effected may take one or another of several forms. The simplest of these, in point of law, is the treaty of *sale*, which has figured so prominently in the history of the United States. The Louisiana Purchase of 1803, the Florida Purchase of 1819, the Gadsden Purchase of 1853, the Alaska Purchase of 1867, and more recently the purchase of the Danish West Indies in 1916, in addition to several lesser purchases, make the record of the United States, in respect to expansion by purchase of territory, unique in the history of international law. A second form of transfer is the *exchange* of one area of territory for another, of which there are recent instances in the cession by Rumania to Russia in 1878 of a part of Bessarabia lying north of the Danube in exchange for the Dobrudja south of the Danube, and in the cession by Great Britain to Germany in 1890 of the island of Helgoland in exchange for territory adjoining German East Africa.

In addition to these normal business transactions may be mentioned such cases, rare in modern times, as the transfer of the Congo Free State in 1908 to Belgium by devise of King Leopold, who at the time of his death was sovereign of the Congo in his personal capacity as distinct from his position as king of Belgium. Here also may be mentioned the occasional *free gifts* made by one state to another, such as the cession in 1850 of a portion of the Horse-Shoe Reef in Lake Erie by Great Britain to the United States, on condition that the latter would erect upon it a light-

[1] For the status of these territories following their cession by Spain, see Willoughby, *Constitutional Law*, I, Chap. XXX, and judicial decisions there cited.

CHAP. XIV

house for the benefit of the navigation of both countries. Austria's gift of Lombardy to France in 1859 and of Venice to the same power in 1866 were, it should be noted, merely disguised methods of avoiding a direct transfer to Sardinia. Transfer of territory by marriage contract, common in the days of feudal monarchs whose territories were their patrimony, of which they might dispose freely, became no longer possible when the distinction between sovereignty and actual ownership came to be accepted.

Cession by treaty of peace

The above forms of cession rest upon contracts voluntary both in legal theory and in actual fact. Far more numerous, however, have been the cessions provided for in treaties of peace with which wars have come to a close. These cessions represent, in most instances, terms imposed by the victor upon the defeated state, and to that extent they are in fact contracts made under duress. But inasmuch as war is, under international law, a legal method of procedure,[1] the fact of coercion does not operate to invalidate a treaty of peace.[2] It is common for writers to refer to transfers of territory in treaties of peace, where technical consideration for the contract is lacking, as "gifts"; but the term seems a mockery when applied to such cessions as that of California to the United States by the Treaty of Guadalupe-Hidalgo in 1848, or that of Alsace-Lorraine to Germany by the Treaty of Frankfort in 1871, or that of the southern part of the island of Sakhalin to Japan by the Treaty of Portsmouth in 1905. Occasionally a transfer of territory under duress will take on the disguise of a purchase, as in the case of the payment by the United States to Mexico in 1848 of the sum of fifteen million dollars "in consideration of the extension acquired by the boundaries of the United States, as defined in the 5th Article of the present treaty,"[3] and again in the case of the payment to Spain of the sum of twenty million dollars for the Philippine Islands, which, as a matter of law, could quite as easily have been taken over by right of conquest, as was Porto Rico.

The plebiscite as a condition of transfer

The growth of democratic government during the second half of the nineteenth century introduced a new issue into the rules governing the cession of territory. Hitherto it had been the custom for one state to transfer territory to another without question as to the wishes of the inhabitants of the ceded lands. A number of writers had, indeed, laid down the principle that transfers of

[1] See below, p. 428.
[2] See below, p. 327.
[3] Art. XII, Malloy, *Treaties*, I, 1107.

territory should be made to depend upon the approval of the inhabitants. Grotius relied upon the contract theory of the state in asserting that "in the alienation of a part of a sovereign state it is, moreover, required that the part which is to be alienated must give its consent."[1] Vattel argued on the same basis that a nation "has no right to barter away their [its members'] allegiance and their liberty for certain advantages which it hopes for in return."[2] But both writers were laying down theoretical doctrines rather than stating customary law. The American Declaration of Independence announced the doctrine of the right of a people to determine its own form of government;[3] and the success of the revolution based upon that doctrine prepared the ground for the subsequent extension of the idea to an analogous field. It was the French Revolution, however, that gave the first definite expression to the principle that, consistently with the new doctrine of popular sovereignty, wars of conquest should be abandoned, and the consent of the people of a territory should be obtained to their transfer from one sovereignty to another.[4] Several minor transfers of territory were shortly afterward made in accordance with the new principle.

Practice during the nineteenth century

In the second decade of the nineteenth century a new impulse was given to the theory by the development of nationalism in general, and in particular by the wars for the unification of Italy. Plebiscites were taken in 1848 in Lombardy, Venetia, and other Italian duchies, which formally annexed their territories to Sardinia while remaining under *de facto* Austrian control. Further plebiscites were taken in 1860 in other Italian provinces liberated in the war of 1859. Napoleon III, a warm advocate of the doctrine of nationality, applied the plebiscite to the annexation of Savoy and Nice to France in 1860. Three years later Great Britain agreed to cede the Ionian Islands to Greece on condition of a vote of approval by a legislative assembly of the islands especially elected for the purpose. In the Treaty of Prague following the "Seven Weeks' War" the transfer of Northern Schleswig to Prus-

[1] *Op. cit.*, Lib. II, Cap. VI, § IV.

[2] *Op. cit.*, Bk. I, § 263.

[3] The student will note that the Declaration of Independence asserted both a right of self-government on the part of the people of the state as a whole, and a right on the part of a particular group or community of people to sever themselves under certain circumstances from the larger state of which they constituted a part. And this latter right might be exercised even by colonies of the same race, language, and legal traditions as those of the mother-country.

[4] Wambaugh, *Monograph on Plebiscites*, 177.

sia was made conditional upon a free vote of the inhabitants; a condition, however, which was canceled by the treaty of Vienna of 1878. In the treaty of 1867 between the United States and Denmark provision was made for the cession of the Danish West Indies subject to an affirmative vote on the part of the inhabitants. The plebiscite provided for was duly taken, but in spite of its favorable results the treaty failed of ratification by the United States.[1]

But side by side with these cases were others in which the principle of the plebiscite was equally applicable, but in which there was no thought on the part of the annexing state of applying it. The failure of Prussia to carry out the provisions of the Treaty of Prague, and in particular the annexation of Alsace-Lorraine in 1871 over the protests of its inhabitants, gave a distinct set-back to the principle. After 1871 the few minor instances of its application were more than counterbalanced by the conspicuous neglect of it in other cases.

It cannot be said, therefore, that at the opening of the World War the isolated cases of the taking of a plebiscite had had the effect of establishing a rule of customary international law. That it was a commendable practice to resort to the plebiscite where the circumstances permitted was the most that might be inferred from the actual practice of the nations. Certain publicists and writers, particularly of the French and Italian schools, asserted dogmatically that the principle was part of international law; but their appeal to the natural and inalienable rights of man could not change a law which was fixed by the hard facts of international life. British and American writers, consistently with the practice of their governments, gave little weight to the theory. There is a tone of finality in the statement of Hall that "the principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded, has not been adopted into international law, and cannot be adopted into it until title by conquest has disappeared."[2] German writers, having in mind apparently a justification of the expansion of Prussia by right of conquest, attacked the theory as wrong in principle and worthless in practice.[3]

[1] For a summary of these and other proposed and actual applications of the plebiscite, see Wambaugh, *op. cit.*, 33 ff.

[2] *International Law*, § 9.

[3] A summary of the opposing views of publicists with respect to the application of the plebiscite to transfers of territory may be found in Wambaugh, *op. cit.*, 21-33.

Plebiscites attending the transfer of territory in 1919

A new impulse to the doctrine of the right of self-determination was given by the United States on the eve of its entrance into the World War. On January 22, 1917, President Wilson laid before the Senate, as one of the conditions of coöperation by the United States in the establishment of an international league to guarantee peace, the principle that "no peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property." A year later, in the enumeration of the "fourteen points" forming the basis of a durable peace, the same principle of self-determination was reiterated in more definite form as applying specifically to the subject nationalities of the enemy powers.[1] Again, on July 4, 1918, the President demanded "the settlement of every question, whether of territory, of sovereignty, of economic arrangement, or of political relationship, upon the basis of the free acceptance of that settlement by the people immediately concerned."[2]

In the framing of the several treaties of peace the Conference at Paris recognized these principles as properly governing the determination of new boundary-lines, although the application of the principles was defeated at several points by the intrusion of political interests. The retention by Belgium of the districts of Eupen and Malmedy was made dependent upon the decision of the League of Nations following a plebiscite taken in the territory.[3] The Saar Basin was put under the League of Nations as trustee, with the provision that at the end of fifteen years a plebiscite should be taken to indicate the sovereignty under which the inhabitants desired to be placed.[4] The boundary between Germany and Denmark was fixed by dividing the disputed area of Northern Schleswig into two zones and providing for a separate plebiscite to be taken in each zone.[5] The boundary between Poland and Germany in the corner of Upper Silesia was to be determined by a plebiscite, as was also the boundary on the north in two separate areas of East Prussia.[6]

In the practical application of the doctrine of self-determination

[1] Address of January 8, 1918, before Congress.
[2] Address at Mount Vernon, before representatives of the Allied nations.
[3] Art. 34. [4] Art. 49. [5] Art. 109-111.
[6] Art. 88, 94-97. For a study of the difficulties attending the determination of the Upper Silesian boundary, see G. A. Finch, "Upper Silesia," *Am. Journal*, XVI, (1922), 75. For the final settlement, see treaty of May 15, 1922, between Poland and Germany.

CHAP. XIV

Obstacles to the practical application of the doctrine

the Peace Conference made compromises to meet economic as well as political conditions. Questions were raised to which it was difficult to give an answer in any but the vaguest terms. How large was to be the area which might be allowed the right of self-determination? Obviously a single city or small district could not conveniently be permitted to isolate itself from territory with which it formed a geographical whole. Should the local interests of a small group desiring self-determination be allowed to defeat the important economic needs of a larger neighboring group? If market and manufacturing towns were cut off from the agricultural districts which fed them, there would be loss on both sides until such time as new artificial trade relationships could be created. Moreover, political considerations could not be overlooked. The desire for a strategic boundary led Italy to annex parts of the Tyrol admittedly Austrian in nationality. At the same time, the victorious powers were confronted with several "domestic" questions of a character analogous to the transfer of territory in accordance with the principle of self-determination. Great Britain was unwilling to allow Ireland to detach itself from the empire, partly for political and partly, doubtless, for economic reasons. Besides, it was a question whether certain peoples demanding self-determination had reached that stage of political development at which they gave promise of being able to maintain a stable existence as an independent state. The United States had already pledged itself to recognize the independence of the Philippine Islands when they had given promise of their ability to maintain a stable government. Great Britain felt that India and Egypt were ready only for probationary forms of self-government.

Conditions of its successful application

The net result of the several peace treaties, therefore, may be said to be a recognition by the powers that were parties to them of the general principle that transfers of territory should be conditioned upon the wishes of the inhabitants of the territory wherever the circumstances make it possible to consult local opinion. That the qualification of the principle leaves it of dubious value must be conceded. Yet it may be questioned whether in its present state of development international law could effectively prescribe more specific rules. So long as the economic relations of states remain unregulated by international law, it is inevitable that the cession of territory will involve larger issues than the local interests of the inhabitants of a given district. So long as the law of self-protection dominates the political relations of nations, par-

ticular territories will have a strategic value which will be taken into account irrespective of the welfare of the people who inhabit them. Some progress toward the practical alleviation of the condition of a community or larger group that is denied self-determination has doubtless been made in the more general recognition by nations, such as is expressly given in the several treaties of peace,[1] of the right of minorities of alien race and language to be protected against nationalizing measures on the part of the state to which they must remain subject. Beyond that, such further progress as may be made toward the satisfaction of the demand for local self-determination would appear to depend in large part upon the creation of an international organization capable of preventing aggression and securing justice, as well as upon the conclusion of general conventions modifying the present exclusive economic advantages attached to territorial sovereignty in favor of a policy of equal opportunities for all nations.

Individual option of inhabitants

Although unwilling to make cessions of territory conditional upon a plebiscite of the inhabitants, states have in many cases during the past century stipulated in treaties of cession that the inhabitants of the territory should have the option of retaining their old allegiance instead of automatically acquiring the allegiance of the state annexing the territory.[2] Provision for such an election was made with respect to Mexicans residing in the territory ceded to the United States in 1848, with respect to Russian subjects residing in Alaska in 1867, and with respect to Spanish subjects "natives of the Peninsula" residing in the Philippines and Porto Rico in 1898,[3] natives of the islands themselves not being given the option. The treaty with Denmark of August 4, 1916, providing for the cession of the Danish West Indies, contains liberal provisions for the option of change of allegiance, without prejudice to the property rights of those electing to retain Danish citizenship, whether or not continuing in residence in the islands.[4] The practice of other nations has varied according to the circumstances. The older rule, dating back to the seventeenth century, of requiring persons wishing to retain their old nationality to emi-

[1] See above, p. 91.

[2] In the absence of special exceptions the transfer of territory is accompanied by a "collective naturalization" of the inhabitants. See Moore, *Digest*, III, § 379.

[3] Treaty of Guadalupe, Art. VIII; Treaty of Washington, Art. III; Treaty of Paris, Art. IX. Malloy, *Treaties*, I, 1107, II, 1521, 1690. Moore, *Digest*, III, § 380.

[4] *Treaty Series*, No. 629.

CHAP. XIV

grate within a given period, was frequently applied in the nineteenth century. In the case of the cession of Alsace-Lorraine by the Treaty of Frankfort, May 10, 1871, residents wishing to retain their French nationality were given until October 1, 1872, within which to transfer their domicile to French soil, and they were at the same time required to dispose of real property located in the annexed provinces.[1]

Provisions of the peace treaties of 1919

The provisions of the several treaties concluding the World War are, with the exception of the Treaty of Lausanne, on the whole, more liberal. The Treaty of Versailles provides for the automatic transfer of nationality in the case of persons continuing to reside in the territories transferred to Belgium, Poland, and Czechoslovakia.[2] Persons who wish to retain their former nationality may, however, elect to do so within a period of two years, in which case they must transfer their residence to Germany, although they may retain their immovable property in the ceded territory.[3] A similar provision regulates the status of former German nationals resident in the Free City of Dantzig.[4] More elaborate rules, of a unique character, were prescribed for the national status of the inhabitants of Alsace-Lorraine.[5] With these provisions must be associated the special treaties entered into for the protection of minorities.[6]

Compulsory transfer under the Treaty of Lausanne

Unique provisions, almost without precedent in modern history,[1] are contained in the Convention Concerning the Exchange of Greek and Turkish Populations, concluded as a supplement to the Treaty of Lausanne on July 24, 1923. While persons of alien races other than Greek and Turkish were left undisturbed, and were offered protection under the minorities provisions of the main treaty, it was provided in the special convention that there should be a compulsory transfer to Greece of Turkish nationals of the Greek Orthodox religion and the transfer to Turkey of the Moslem inhabitants of Greek territory.[7] The exchange of populations was, however, to

[1] Art. 2. Hertslet, *Map of Europe by Treaty*, III, 1954.
[2] Art. 36, 84, 91.
[3] Art. 37, 85, 91.
[4] Art. 100.
[5] Art. 53 and annex.
[6] See above, p. 91.
[7] A similar fate appears to have befallen the Paraguay Indians in 1750, and some six thousand French Acadians in 1755, although in the latter case the action taken was not in pursuance of treaty stipulations.
[8] Art. 1. It is uncertain, at present writing, whether this unusual, and in its immediate aspects, cruel solution of the minorities problem in Turkey was due to Turkish influence at Lausanne or to that of others who saw in the transfer the only permanent basis of future amicable relations between the two countries.

be carried out without prejudice to the property or monetary assets of the transferred inhabitants, with the exception of immovable property, which was to be liquidated by a mixed commission.[1] Reciprocal acquisition by the transferred persons of a new Greek or Turkish nationality was provided for.[2]

Property rights in transferred territories

With respect to the property of the inhabitants of the ceded territory, it is only necessary to observe that treaties generally make specific provision that present property rights shall remain undisturbed by the change of sovereignty. Even in the absence of such provisions, the custom has become fixed that a transfer of territory from state to state does no more than transfer sovereignty over the territory, leaving the property rights of the inhabitants unaffected. Hence if the annexing state should undertake to confiscate the property of the inhabitants of the ceded territory by any law not applicable to the citizens of the state as a whole, there would be legal ground for protest from the ceding state.

f. Title by conquest

Conquest, in its technical sense as a mode of acquiring title to property, must be distinguished from cession on the one hand and from prescription on the other. Title by conquest is often popularly confused with title by cession made under duress, but the term should more properly be reserved for those cases in which foreign territory is effectively occupied in time of war and retained at the close of the war without confirmation of the inchoate title by the treaty of peace or other formal document.[3] Title by conquest differs from title by prescription in that the latter originates in a peaceful occupation, which becomes lawful by failure of the owner to assert his rights. By resorting to a legal fiction, some writers pretend to see in conquest a form of occupation of territory which, by reason of the overthrow of the sovereign in control, has become *res nullius*.[4] Again, others see in it a form of prescription based, after due time, upon the presumed abandonment of the territory by its former owner.[5] It is also disputed

[1] Art. 5, 9.

[2] Art. 7.

[3] The question as to the time at which military occupation of a territory can be considered as having developed into permanent conquest or subjugation is discussed in connection with the laws of war. Below, p. 574.

[4] For example, Holtzendorff, *Handbuch des Völkerrechts*, II, 225. Cited by Oppenheim, *Int. Law*, I, § 237.

[5] Bonfils, among other writers, openly repudiates conquest as a ground of title. "It is not," he says, "a mode of acquiring territory. A taking of possession by violence is no more than a plain and hard fact. The holding of the territory by the conqueror can only take on a legal character by the formal or

whether title acquired by conquest is original or derivative, the answer being dependent, as in the case of prescription, upon the point whether a derivative title is one derived through another state or merely one which another state previously held. But these are academic questions which have no bearing upon the realities of international life.

Its effects

In more modern times title by conquest has rarely been acquired except in cases where the state in possession of the territory has been completely overthrown. Where the state survives, it is usual to have the title confirmed by the treaty of peace, in which case it becomes technically title by cession.[1] Title acquired by conquest thus leaves the conqueror in full possession of the territory without restrictions of any kind upon the control which he may exercise over it. The acquiescence of third states must be looked upon as giving legal validity to what has already become an accomplished fact. As between the new sovereign and the inhabitants of the territory, such rights as the latter may continue to enjoy are a matter of domestic constitutional law, with which international law is not concerned.[2] It would appear, however, that the custom has now become firmly established that the acquisition of territory by conquest does no more than transfer the sovereignty from one state to another, and, as in the case of formal cession, does not affect the possession of private property by the inhabitants of the territory; so that while the inhabitants as such could not obtain a hearing at international law if their property were confiscated, third states would have a right to intervene in behalf of their own citizens who might happen to own property in the territory.

National status of inhabitants

With respect to the national status of the inhabitants, it would seem that their allegiance is automatically transferred from the extinct state to the annexing state. The practice of states has not been sufficiently uniform to establish a right of individual "option" in the case of inhabitants of conquered territory, such as is

tacit abandonment of it by the conquered. The seizure must be sanctioned by a treaty of peace, an express agreement, or by prescription which implies acquiescence." *Droit International*, § 535.

[1] An exceptional instance of an attempt to anticipate subsequent cession by treaty is to be seen in the formal annexation of Tripoli by Italy on November 5, 1911, while hostilities with Turkey were still in progress. But it is doubtful what international validity can be attached to so irregular a proceeding.

[2] The effects upon individual rights of a temporary military occupation are discussed in United States *v.* Rice, 4 Wheaton, 246 (1819). Scott, *Cases*, 707; Evans, 186.

frequently provided for in treaties of cession; so that as long as international law recognizes conquest as a legal method of acquiring territory the arbitrary decision of the conquering state will doubtless continue to give rise to divergences of practice.

g. Leases

Within recent years states have frequently resorted to long-term leases as a means of securing control of territory, without prejudicing the formal sovereignty of the lessor state. The latter has been in every case a weak state, unable to resist the demand made upon it by the lessee. Thus, in 1898 when the Great Powers were in occupation of Peking following the suppression of the Boxer riots, China leased Port Arthur and Talien-wan (Dalny) to Russia for a term of twenty-five years, with a possible further extension by common agreement. Germany obtained a lease of Kiao-chau for a term of ninety-nine years; Great Britain a lease of Wei-hai-wei for twenty-five years, and a lease of territory opposite Hong-Kong for ninety-nine years; and France a lease of Kwang-chau-wan.[1] These leases differ in several respects from the leases familiar to municipal law. Apart from the element of coercion in their negotiation, it would seem that the sovereignty of the lessor state over the territory is more nominal than real. When at the close of the Russo-Japanese War in 1905 Russia agreed in the Treaty of Portsmouth to "transfer and assign" to Japan the lease of Port Arthur, China, as landlord, was not consulted as to the new tenant. During the war itself the territory was fought over without regard for the rights of China as neutral owner. In 1914 Japan attacked and conquered Kiao-chau precisely as if it were territory under the sovereignty of Germany. Article 156 of the Treaty of Versailles provided for the transfer by Germany to Japan of "all her rights, title, and privileges" which were acquired from China in 1898 and subsequently. This transfer, made against the protests of the Chinese delegation at Paris, acquired a presumptive, if not actual, validity at international law in consequence of the approval of the large number of states ratifying the treaty. It was, however, nullified by the subsequent treaty concluded between China and Japan, February 4, 1922, at the close of the Conference on the Limitation of Armaments at Washington, in accordance with which (Article I) Japan agreed to restore the territory of China.[2] At the same time, Great Britain announced

[1] The Chinese leases are discussed in detail in Willoughby, *Foreign Rights and Interests in China*, Chap. VIII.

[2] For the text of the agreement, see *Am. Journal*, Vol. 16, Supplement, 84.

CHAP. XIV

its readiness to surrender under suitable conditions the lease of Wei-hai-wei, while France repeated an earlier declaration of its readiness to surrender the lease of Kwang-chau-wan *pari passu* with the surrender of the leases held by the other powers.[1]

Lease of the Panama Canal Zone

The term "lease" is not mentioned in the treaty of 1903 by which (Article II) "the Republic of Panama grants to the United States in perpetuity the use, occupation and control" of the zone of land and adjacent territory for the construction of an inter-oceanic canal. Technically, Panama retained sovereignty over the territory, although it was expressly provided that the United States should be allowed to exercise over the territory "all the rights, power, and authority" which it would possess if it were sovereign. In compensation for the rights acquired, the United States agreed to make both a cash payment and a smaller annual payment during the life of the convention.[2] The lease of Guantánamo and Bahia Honda from Cuba presented fewer administrative complications. The treaty of 1903 defining the relations between the United States and Cuba provided (Article VII) that, in order to enable the United States to maintain the independence of Cuba and to protect the people of the island, as well as to further the island's own defense, Cuba should sell or lease to the United States lands necessary for coaling or naval stations. The lease of the two areas was thereupon effected by means of an executive agreement defining the territory leased, followed by a second agreement fixing the conditions of the lease.[3]

[1] Willoughby, *China at the Conference,* Chap. XIV.
[2] Malloy, *Treaties,* II, 1349.
[3] *Ibid.,* I, 362, 358, 360.

CHAPTER XV

JURISDICTION OVER TERRITORY: NATIONAL BOUNDARIES

a. Sources of the law

The extent of a state's territorial domain is determined by definite boundary lines, which mark at once the limits of the property rights of the state and of its jurisdiction over persons. In the determination of these boundary lines, as in the case of the acquisition of title to the territory itself, international law has drawn heavily upon the *jus gentium* of the Roman law. So closely did the analogy between states as corporate persons and the individual citizens of the state seem to the early writers to hold, that wherever there was doubt as to a particular boundary line they did not hesitate to decide the case according to the time-honored principles of the civil law. The comparison between the two legal systems is instructive; but here, as elsewhere, it is the practice of states that must determine the actual law in force between them.[1] It should be noted, however, that neither in municipal nor in international law have boundary lines been fixed upon any general principle of the common welfare of the group as opposed to the personal interests of the individual owner. In municipal law the disadvantages of the late comer as against the first comer, of the landless as against the landed interests, are largely offset by the highways of common property which everywhere intersect private property; whereas in international law boundaries have a distinct strategic value for political and economic purposes. These latter aspects of boundary lines will appear more clearly if discussed in connection with easements and servitudes. For the moment only the technical aspects will be presented.

b. Determination of boundary lines

The existing boundary lines of European states have been determined for the most part by definite international conventions. Many of these conventions have been in the form of treaties of

[1] The civil law, like the English and American common law, may properly be resorted to as a test of the intrinsic value of the rules of international law, due allowance being made for the differences in the subjects to which the law is applied. The danger of such comparisons has been the tendency of the older writers to draw inferences from the one law to supply the deficiencies of the other, and thereupon to proclaim such inferences as rules of international law. See above, p. 51.

CHAP. XV

peace following wars of conquest, or wars with disputed territory as their object; others have been in the form of voluntary agreements by which an amicable settlement of boundaries has been brought about. Since 1648 the map of Europe has been redrawn many times, whether by such general treaties as those of Westphalia in 1648, Vienna in 1815, or Paris in 1919, or by more restricted agreements between smaller groups of states. In many instances these conventional agreements merely confirm old lines fixed by prescription which, as was observed in connection with the occupation of territory, is the original ground of title. Other European boundaries are purely prescriptive, and it would be difficult to find the international document, if any, in which they were originally laid out. The boundary lines of the Western hemisphere have been determined partly by prescription at the time of the occupation of the territory by the colonizing states of Europe, and partly by conventions entered into at the time of the establishment of the independence of former colonies, or by subsequent treaties of cession. The boundaries of Africa are almost wholly conventional, following earlier prescriptive titles; those of Asia are partly conventional and partly prescriptive.

"Natural" and artificial boundaries

It is common for writers to distinguish between natural and artificial boundaries, the former consisting of mountains, rivers, etc., while the latter consist of the geographic lines of longtitude and latitude. The distinction is, however, apt to be misleading, since it suggests that qualities which really belong to the mere surveyor's lines of demarcation are to be attributed to boundaries as political lines of separation. The regional movements of civilization have not in fact conformed themselves in all cases to the physical contour of nature. As an abstract proposition it may well be questioned, for example, whether rivers are a "natural" boundary line, since they separate by political barriers groups which by the laws of economic life are "naturally" drawn together. Care should be taken, moreover, to test both by positive law and by constructive politics other misleading senses in which the term "natural boundaries" is used. Mountains which have a strategic value for purposes of defense have been called, as in the case of the Tyrolese Alps, a "natural" frontier, although it may happen that in accepting them as a conventional boundary, as was done by the Treaty of St.-Germain in 1919, violence is done to those other frontiers, also said to be "natural," which include members of the same race and language. If by "natural" should be meant "desirable from

an economic or social point of view," many of the present boundaries of states are admittedly unnatural, whatever natural landmarks there may be to designate them.[1]

c. The water divide as a boundary

In the technical delimitation of boundary lines certain rules have been worked out which may be regarded as the prescriptive or customary law of the subject holding good in the absence of treaty stipulations. When a range of hills forms the boundary, the water divide or watershed constitutes the frontier line. This line, in undefined form, is frequently provided for in treaties, leaving to boundary commissions the more exact survey. The chief difficulty in the delimitation of such boundaries has arisen from the fact that the water divide is sometimes not identical with the highest crest of the range. This issue arose, for example, in connection with the Northeastern Boundary Dispute between the United States and Great Britain,[2] and more recently between Chile and the Argentine Republic in connection with the watershed of the Andes.[3]

d. Rivers as boundaries: the thalweg

As a matter of geographic convenience, and in certain cases because of their strategic value as natural barriers, rivers have frequently been incorporated into the boundary lines of states. In the delimitation of the dividing line formed by a boundary river, the older rule laid down by Grotius and indorsed by Vattel was that the line followed the middle of the stream. This rule came to be modified at the beginning of the nineteenth century by substituting in the case of navigable rivers the middle of the main channel or strongest current down-stream, technically known as the "thalweg."[4] The advantages of the latter rule were that the boundary line followed more closely the chief thoroughfare of commerce, and was at the same time less subject to change than the middle line between bank and bank. In the various boundary treaties of the United States involving rivers the terms used to describe the boundary have not been uniform, and several international disputes have arisen in consequence. The treaty of 1783 with Great Britain referred to the "middle" of boundary rivers;[5] the treaty of 1795

[1] For a discussion of boundary lines from the point of view of a "practical" delimitation as opposed to sociological theories, see Holdich, *Political Frontiers and Boundary Making*, Chap. II. For an opposing view, see Lyde, *Some Frontiers of To-morrow*, Chap. II.

[2] See Moore, *Arbitrations*, I, 65-161.

[3] *Ibid.*, V, 4854 ff.

[4] The derivation of this term is discussed by Westlake, *Int. Law*, 2nd ed., I, 144.

[5] Art. II, Malloy, *Treaties*, I, 586.

CHAP. XV

with Spain to the "middle" of one river and to the "middle of the channel" of another;[1] while in other treaties it is provided that the boundary shall follow the "middle of the main channel" or, in the more recent treaty of 1908 with Great Britain, "the center of the main channel or thalweg."[2]

Effect of erosion and avulsion

The gradual shifting of the thalweg from one side to the other by reason of imperceptible erosion or accretion of the banks of the river has, as a general rule, the effect of changing the boundary to a corresponding degree. If, however, the river should, by the process known as "avulsion," suddenly become diverted from its regular channel, the boundary line remains where it was before the change. This general rule presented technical difficulties in the settlement of the dispute between the United States and Mexico in connection with the boundaries of the Rio Grande and the Rio Colorado. A boundary convention of 1884 had made provision for the shifting of the mid-channel, because of slow erosion, without abandonment of the river-bed. The international commission appointed under the Chamizal Arbitration Convention of 1910[3] held that even rapid and obvious erosion should not affect the boundary where the old bed had not been abandoned. In some European treaties an effort has been made to give a greater degree of stability to river boundary lines by locating the thalweg definitely by means of fixed points which were to constitute permanent landmarks for the future. In the Treaty of Versailles of 1919 provision was made that the principal channel of navigable rivers should be the dividing line; but it was further provided that it should be left to the several boundary commissioners appointed by the treaty to determine whether the boundary line should follow subsequent changes of the channel or should be definitely fixed by the position of the channel at the time. (Art. 30).[4]

[1] Arts. II, IV. *Ibid.*, II, 1640.

[2] Art. II. *Ibid.*, I, 815.

[3] For the text of the convention, see Charles, *Treaties*, 91. For the award, see *Am. Journal*, V (1911), 785, and editorial comment, 709. It may be noted that the United States refused to accept the award, and that the question remains unsettled.

[4] The student will find a wealth of illustrative material in the numerous boundary disputes between the several States of the United States. In such cases the federal Supreme Court, having obligatory jurisdiction over the parties, has attempted to apply the principles of international law to the relations of the members of the federal union. While the decisions rendered are not precedents for the establishment of a rule of international law, since the parties involved are not technically states and the law applied is constitutional law, nevertheless they are valuable practical applications of rules deemed by

Dividing line upon bridges

The convenience of making the mid-channel of a river the dividing line between two riparian states has not necessarily led to the adoption of a corresponding boundary line overhead where bridges span the river. European treaties of the nineteenth century generally fixed upon the middle of the bridge as the dividing line, irrespective of the channel underneath. Such was the provision made in the declaration of 1861 with respect to the jurisdictional limits of France and Baden on bridges crossing the Rhine.[1] The problem of the joint construction and maintenance of the bridge apparently dictated the choice of a different boundary line in the one case from that in the other. By contrast, the United States and Mexico found it more convenient to provide, as stipulated in the convention of 1884, that in the event of the building of an international bridge across the Rio Grande or the Rio Colorado the dividing line of jurisdiction should be determined by a point immediately over the main channel, which line, however, should remain fixed notwithstanding subsequent changes in the channel.[2]

c. Boundary straits and lakes

Straits forming the boundary between two states are governed by the same general rules that apply to boundary rivers. Too few precedents exist to determine whether the middle of the strait or the middle of the main channel, if there be one, constitutes the dividing line; but it is generally asserted by authors that, by logical inference from the case of rivers, the latter rule should prevail. In the case of lakes which are incorporated into the boundary be-

the court to be good international law. In the case of Handly's Lessee *v.* Anthony, 5 Wheaton, 374 (1820), Scott, *Cases*, 200, the court dealt with the exceptional case in which a State, in making a cession of territory lying on the further side of a river (the Ohio), retains ownership of the whole river, so as to make the further shore the boundary line between the two States. The same rule governed the later case of Indiana *v.* Kentucky, 136 U. S., 479 (1889). In the case of Iowa *v.* Illinois, 149 U. S., 1 (1893), the court held that by international law, as shown in the usage of European states, the terms "middle of the stream" and "mid-channel" were synonymous; but this interpretation has been contested as incorrect. The case of Washington *v.* Oregon, 211 U. S., 127 (1908), dealt with the problem of a river (the Columbia) having two channels, each of which was at different times the main channel. The case of Nebraska *v.* Iowa, 143 U. S., 359 (1892), and the case of Arkansas *v.* Tennessee, 246 U. S., 158 (1918), dealt with the problem of slow accretion and sudden avulsion in their effects upon the boundary line. The meaning of the thalweg as a boundary line is discussed in the case of Louisiana *v.* Mississippi, 202 U. S., 1 (1906), and in the later case of Minnesota *v.* Wisconsin, 252 U. S., 273 (1920). See Scott, *Judicial Settlement of Controversies between States of the American Union*, under index title "Boundaries." Also, Hyde, *International Law*, I, § 138, notes.

[1] De Clercq, *Treaties*, VIII, 160; quoted by Hyde, *op. cit.*, I, § 140.

[2] Art. IV. Malloy, *Treaties*, I, 1159.

CHAP. XV

tween two states, the dividing line, in the absence of special provisions to the contrary, follows the middle of the lake. In the treaty of 1783 with Great Britain the boundary line between the United States and Canada was fixed by a line running through the middle of Lakes Superior, Huron, Ontario, and Erie and their connecting links.[1] In the case of Lake Constance, which forms a corner boundary between Germany, Austria, and Switzerland, the three boundaries meet at a surveyor's point on the waters of the lake.

f. The maritime boundary: the marginal sea

Much more difficult of determination than the boundary line of rivers, straits, and lakes, is the maritime boundary marking the limits of the territorial domain of the state when terminating at the high seas. The problem presents several distinct aspects, the first relating to the general claim by states of jurisdiction over the marginal sea bordering their coasts, the others relating to more specific claims of jurisdiction over gulfs and bays along the coast and over straits connecting the high seas on either side of a state's territory.

The "marine league" or "three-mile limit"

That the territorial jurisdiction of a state should extend beyond the low-water mark along its coasts seemed to the early writers on international law a logical necessity of self-defense. At the same time it formed the rational basis of a claim to the exclusive enjoyment of local fisheries and other similar advantages. Setting aside the extravagant claims made by certain maritime states to jurisdiction over wide areas of adjacent seas,[2] we find that by the middle of the eighteenth century the maritime boundary of a state was coming to be accepted as extending out from the shore to the limit of the carrying range of a cannon-shot. This strip of marginal sea, or maritime belt, represented the area over which a state might exercise effective control and in that sense "occupy" the area as a ground for the assertion of sovereignty over it. The Dutch publicist Bynkershoek, writing in 1702, stated the rule in terms which later were accepted as authoritative.[3] At about the

[1] Art. II. Malloy, *Treaties*, I, 586. [2] See below, p. 291.

[3] *De Dominio Maris* (Eng. trans.), Chap. 2. "Wherefore on the whole it seems a better rule that the control of the land [over the sea] extends as far as cannon will carry (quousque tormenta exploduntur); for that is as far as we seem to have both command and possession. I am speaking, however, of our own times, in which we use those engines of war; otherwise I should have to say in general terms that the control from the land ends where the power of men's weapons ends (potestatem terræ finiri ubi finitur armorum vis)." For "control of the land" might be substituted "territorial jurisdiction." Bynkershock's rule reappears in his *Quæstiones Juris Publicæ*, lib. I, cap. 8, published in 1737.

same time the maritime boundary began to be more clearly defined in terms of a fixed three-mile limit corresponding approximately to the range of cannon-shot at that day, and it became thereafter known as the "marine league." During the nineteenth century this more specific maritime boundary became generally accepted by the leading powers, particularly by Great Britain and the United States, as marking the extreme limit of territorial sovereignty.[1] Nevertheless the increasing range of modern guns during the nineteenth century frequently raised the question not only as to the desirability of changing a rule founded upon the conditions of other times, but as to the actual legal validity of the three-mile limit as against the older general principle of a jurisdiction determined by effective control from the shore.[2]

Exclusive jurisdiction of the state

Within the limits of the marginal sea the jurisdiction of the state is, with but one exception,[3] as exclusive as is its jurisdiction over the land itself. Local fishing rights in these territorial waters are regularly reserved to the citizens of the state. Civil and criminal jurisdiction is exercised over acts committed within the maritime belt whether on board vessels flying the national flag or those flying the flag of another state. In the leading case of Queen *v.* Keyn[4] the captain of a German steamer, the *Franconia,* was convicted by a lower British court of manslaughter for the

[1] A recent statement of the law is to be found in Cunard Steamship Co. *v.* Mellon, 262 U. S., 100 (1923): "It is now settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays, and other inclosed arms of the sea along its coast, and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles." Compare, however, the claims of the Baltic states and of Spain and Portugal.

[2] Writers on international law state the rule quite as often in its historical form of "protective jurisdiction" as in its later specific measurement of three miles. In this, however, they appear to be influenced more by the need of a change in the law than by the actual facts of international practice. For a summary of the divergent views of writers, see Fulton, *Sovereignty of the Sea,* 664 ff., who finds that there are few writers "who are of the opinion that the three-mile limit has become established in international jurisprudence as the legal limit, notwithstanding that it is the limit commonly adopted." For details of the opinions of publicists, see Crocker, *The Extent of the Marginal Sea, a collection of official documents and views of representative publicists,* Part I. Also, Borchard, *Coastal Waters,* comprising English translations of extracts from the works of foreign publicists. A recent argument upholding the legality of extending the protective jurisdiction of the state beyond the three-mile limit, so as to permit the seizure of foreign merchant vessels, may be found in P. M. Brown, "Protective Jurisdiction over Marginal Waters," *Proceedings,* Am. Society of Int. Law, 1923, pp. 15-31. *Contra,* F. K. Neilsen, "Is the Jurisdiction of the United States Exclusive within the Three-Mile Limit? Does It Extend beyond This Limit for any Purpose?" *Ibid.,* 32-39.

[3] Namely, the right of innocent passage on the part of foreign ships.

[4] L. R. 2 Exch. Div., 63 (1876). Scott, *Cases,* 243.

CHAP. XV

death of a passenger caused by a collision that took place within three miles of the British coast. The higher court dismissed the case on the ground that, although the exercise by states of jurisdiction over the marine league was evidenced by the practice of nations and by the statements of writers of authority, yet Parliament had not actually extended the criminal jurisdiction of the courts over the territorial waters in question. It should be observed that the case raised no question as to the sovereign right of Great Britain to exercise jurisdiction through its own appropriate agencies; and the decision was promptly followed by the passage of an act of Parliament of 1878 clothing the courts with the requisite authority to hear such cases in the future.

In consequence of the extension of the jurisdiction of the state over the marginal sea, no other state may commit acts within that area which are regarded as in violation of the territorial sovereignty of the state. In the case of the *Itata,*[1] a transport that was being used in the service of Chilean insurgents was, on the ground of alleged violation of the neutrality laws of the United States, pursued by an American cruiser into the harbor of Iquique, Chile, and there seized without resistance. Chile protested against the violation of its sovereignty and demanded redress. The case was arbitrated, and an award was rendered holding the United States liable for damages.[2] In time of war belligerents may not commit acts of hostility within the maritime belt of a neutral state; so that not only may battles not take place between warships of the contending states, but the pursuit of a belligerent merchant ship or of an offending neutral ship may not be continued once the three-mile limit has been crossed.[3]

The further extension of the marine league

But while the three-mile limit has continued to mark the legal bounds of territorial sovereignty, the inconveniences attending so restricted a boundary under modern conditions have led states to extend their control beyond that limit for purposes of self-protection. The control thus assumed, however, has been limited to strictly practical objects, and has been acquiesced in by third states as a matter of comity rather than of strict law. At any rate,

[1] South American Steamship Co. *v.* United States, Moore, *Arbitrations,* III, 3067. Scott, *Cases,* 367.

[2] For the issue as to the violation of the neutrality laws, see United States *v.* Trumbull, 49 Fed., 99 (1891); United States *v.* The Itata, 56 Fed., 505 (1893). Scott, *Cases,* 901.

[3] See below, p. 524.

their acquiescence has not implied the recognition of any territorial rights over the wider area.

Belligerent measures

In time of war, belligerent states have undertaken, as did the United States in 1917, to establish "defensive sea areas" extending beyond the three-mile limit, and to forbid neutral vessels to enter without authorization of a Harbor Entrance Patrol.[1] The more drastic measures of the British Government, mapping out wide areas into which neutral vessels might not enter except in accordance with Admiralty directions, met with protest on the part of neutrals.[2] The issue of territorial self-protection was, however, in this case, complicated by the problem of defending merchant shipping against floating mines, and the question of jurisdiction over the marginal sea became involved with the question of war zones and spheres of naval operations.[3]

Defense of neutral rights

On the other hand, neutral states have sought to protect their territories against the effects of belligerent hostilities by protesting against naval operations in close proximity to their shores. In 1864 France protested to the United States minister that a battle between the *Kearsarge* and the *Alabama,* just outside the three-mile limit, "would be offensive to the dignity of France, and they would not permit it."[4] In 1916, the United States, without questioning the legal rights of British vessels to cruise off American ports beyond the three-mile limit, requested the British Government that they be withdrawn to such distances as would relieve the annoyance caused by their nearer presence.[5] With these situations must be associated a case, such as that of the *Virginius* in 1873, in which states have undertaken in self-defense to seize out on the high seas vessels, sailing under whatever flag, manned by revolutionists or filibusterers with the intent of making a descent upon the territory of the state or otherwise disturbing their domestic peace.[6]

[1] See Executive Order, April 5, 1917, No. 2584.

[2] See below, p. 500.

[3] The war zone, established by Germany by decree of February 4, 1915, was a purely naval measure, bearing no relation to territorial self-protection.

[4] Moore, *Digest,* I, § 150. The American minister contested the legal rights of France in the matter, but advised in favor of an engagement at six or seven miles, if no advantage was sacrificed thereby.

[5] "The constant and menacing presence of cruisers on the high seas near the ports of a neutral country," said Secretary Lansing, "may be regarded according to the canons of international courtesy as a just ground for offense, although it may be strictly legal." *Am. White Book,* III, 139, 141.

[6] In the instance cited a Spanish man-of-war seized at a distance of ten to fifteen miles from Jamaica a vessel flying the American flag but employed in

CHAP. XV

Measures to prevent smuggling

Greater difficulty is experienced in determining whether in time of peace a nation may, without claim of actual territorial sovereignty, extend its jurisdiction beyond the three-mile limit in the interest of facilitating the execution of its municipal laws.[1] Precedents for such an extension of jurisdiction exist in the British Hovering Acts of 1736 and 1784, subsequently repealed, which, with the object of preventing smuggling, forbade the transhipment of foreign goods within four leagues of the coast. In 1799 Congress passed an act, the appropriate sections of which were superseded in 1922, directing officers of United States revenue cutters to board vessels arriving within four leagues of the coast, and to visit and search them to determine the character of their cargo. It was further provided that if any part of the cargo should be unladen within four leagues of the coast or transferred to another vessel without a permit, the masters of the respective vessels should be guilty of a penal offense.[2] Since the act of 1799 refrained from authorizing the seizure of the vessel while still beyond the three-mile limit, the question of a right of seizure was not put at issue. Two early cases are quoted as affirming and denying respectively the existence of such a right. In the case of Church *v.* Hubbart,[3] the Supreme Court of the United States was unwilling to pronounce void the seizure for illicit trade of an American trader by a Portuguese cruiser at four leagues from the coast of Brazil, holding that a state's "power to secure itself from injury may certainly be exercised beyond the limits of its territory." But in the later case of Rose *v.* Himley,[4] the same court held that the seizure under municipal law of an American vessel by a French privateer beyond the limits of the territorial jurisdiction for illicit trade with rebels was not warranted by the law

aiding the Cuban revolutionists. The United States, influenced doubtless by the cruel fate of the expedition, refused to admit the necessity of self-protection as justifying the seizure; but Great Britain did not question it. See above, p. 144.

[1] Such jurisdiction is to be distinguished from the "hot pursuit" of a vessel which has committed an offense within territorial waters and is forthwith pursued upon the high seas and there captured. The right of such hot pursuit appears to be an accepted extension of national jurisdiction. See Hall, *Int. Law*, § 80.

[2] *Rev. Stat.*, §§ 2760, 2867, 2868. *U. S. Comp. Stat.*, §§ 8459½ b (52), 5555, 5556. The acquiescence of foreign powers in the enforcement of hovering laws has generally been put down by writers to "comity" as distinct from law, and this was the position taken by Secretary Fish in 1873. Oppenheim holds that such measures had, by long usage, received the sanction of customary law. *Int. Law*, I, § 190.

[3] 2 Cranch, 187 (1804). Scott, *Cases*, 361; Evans, 157.

[4] 4 Cranch, 241 (1808).

of nations.[1] The circumstances of the latter case gave it at the time the more conclusive character, and it was supported by the subsequent attitude of the Department of State.[2]

Issues raised by the Eighteenth Amendment

The question of a more extended protective jurisdiction not involving territorial sovereignty was raised in concrete form in 1920 when the United States Government found itself in the presence of a formidable "rum-fleet" which stationed itself outside the three-mile limit and delivered its forbidden wares to swift motor-boats which put out from the shore. That the operations of the "rum-fleet" were a serious impediment to the administration of domestic law was not questioned. The Department of State did not consider, however, that the urgency of self-protection warranted the United States in setting aside upon its own motion what was believed to be the established rule of international law.[3] Accordingly, in order to permit action to be taken upon a legal basis, on June 26, 1922, the Department of State proposed to the British Government that a treaty be entered into between the two states providing for a mutual right of search within a limit of twelve miles of vessels flying the flag of the other state. The proposal was, however, declined by a note of October 13, 1922, in which it was stated that his Majesty's Government had "consistently opposed any extension of the limit of territorial waters."[4] Negotiations were reopened in 1923, when the United States pro-

[1] "It is conceded," said the court, "that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign. If these propositions be true, a seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas for the breach of a municipal regulation, is an act which the sovereign cannot authorize." It is little more than an academic question whether Rose *v.* Himley was overruled by Hudson *v.* Guestier, 6 Cranch, 281 (1810), Scott, *Cases,* 365, as was held by Chief Justice Marshall in a dissenting opinion.

[2] The consistent position of the United States Department of State may be found in Moore, *Digest,* I, §§ 145-151. See also Woolsey's Memorandum, *Foreign Relations,* 1912, pp. 1289 ff., where the conflicting decisions of municipal and international arbitration courts are given.

[3] This statement of the attitude of the Department of State is inferred from the conduct pursued.

[4] Some confusion apparently existed in Great Britain as to whether the American proposal called for a twelve-mile territorial limit or merely a right of seizure within twelve miles. See text of the British note cited. (*New York Times,* October 17, 1922.) It should be observed further that there is a practical as well as a legal distinction between a general exercise of jurisdic-

CHAP. XV

posed to forego the right to seize intoxicating liquors on board British vessels in port in return for the concession desired.[1]

In the meantime other departments of the United States Government took independent action. In the case of the *Grace and Ruby*,[2] decided in 1922, the terms of an act of 1884 forbidding transshipment of cargoes by night were held to warrant seizure of a British vessel beyond the three-mile limit on the ground that the participation by the crew in the act of conveying the goods within the United States amounted to a constructive presence of the vessel within the territorial jurisdiction.[3] Further by the tariff act of 1922 provision was made that if the master of a vessel, without a permit, should permit the unlading of goods from a vessel, whether or not bound to the United States, within four leagues of the coast, not merely the goods but the vessel itself should be liable to forfeiture.[4] Such an act must necessarily, as a matter of domestic law, take precedence of the rule, if any, of international law, and it remains an open question whether foreign governments will acquiesce in acts of seizure by the United States Government, should the latter undertake to enforce the law.[5]

g. Bays and gulfs

Thus far the maritime boundary has been considered as following the sinuosities of the coast at a uniform distance from the shore.

tion beyond the three-mile limit and a special exercise of jurisdiction over vessels which, from without the three-mile limit, are engaged in acts which have their immediate effect within the three-mile limit.

[1] On Jan. 23, 1924, a treaty was signed between the United States and Great Britain which provides that, without departing from the principle that three miles from low-water mark constitute the proper limits of territorial waters, the United States may search and seize British vessels attempting to commit offenses against its liquor laws within the distance from the coast that may be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In return for this concession the United States agrees to refrain from enforcing its liquor laws against British vessels in port, provided the intoxicating liquors are kept under seal while the vessel is within territorial waters. *New York Times*, Jan. 24, 1924, p. 10.

[2] 283 Fed. Rep., 475.

[3] The case is now (1923) pending appeal to the Supreme Court. For comment upon the case, see *Harvard Law Rev.*, XXXVI, 609.

[4] Act of September 21, 1922, § 586.

[5] By a ruling of the Treasury Department foreign vessels are not to be seized unless their small boats assist in carrying the contraband across the line. In the case of the *Tomako*, forcibly seized on November 26, 1923, justification for the seizure was offered on the ground that the vessel had previously been in illegal contact with the shore. This would appear to be little more than an extension of the doctrine of "hot pursuit," by which vessels committing an offense within territorial waters may be pursued beyond the territorial jurisdiction provided the pursuit is begun immediately upon the commission of the offense. See, however, the case of the *Henry L. Marshall*, 292 Fed. Rep. 486, where the vessel was captured outside the three-mile limit while delivering its cargo by prearrangement to small boats belonging to others.

The delimitation of the boundary becomes more difficult, and in certain places is still a matter of controversy, when bays, gulfs, and other indentations in the coast-line are met with. That the maritime boundary in such cases should not have been readily determinable was a natural result of complex geographical and economic conditions. The logical application of the rule of the marine league would have left within the territorial jurisdiction of the state all bays and gulfs inside of a line drawn from shore to shore at points six miles apart, since such a line could not be crossed by the maritime boundary without bringing it within less than three miles of the coast on either side. On the other hand, certain bays, considerably wider than six miles at their entrance, were of such a configuration, deep out of all proportion to their width, as to bring them naturally under the control of the state in possession of the territory on both sides of the bay. In consequence a number of states have laid special claim to complete territorial jurisdiction over certain of their bays and gulfs of this character, and it would seem that their claims have obtained legal validity by reason of the long-continued acquiescence of other states. Each case must be judged on its merits, and no general rule can be laid down other than the rule that if the bay exceeds six miles in width a special prescriptive title must be advanced to bring it within the territorial jurisdiction of the state.

Prescriptive rights to territorial bays

The Delaware and Chesapeake Bays, the one ten, the other nine and one half miles wide at its entrance, are by prescriptive right within the exclusive territorial jurisdiction of the United States. In 1793 the attorney-general rendered an opinion that in consequence of the proprietorship of the United States of the lands on both sides of the Delaware the bay was territorial, so that the capture of the British ship *Grange* by a French man-of-war within the waters of the bay was a violation of the neutrality of the United States.[1] A corresponding decision in respect to the Chesapeake Bay was rendered in 1885 by the Court of Commissioners of Alabama Claims. In the case of the *Alleganean*,[2] a vessel which had been captured in 1862 within the waters of the Chesapeake Bay by officers of the Confederate navy, the Commissioners held that the capture was not within the terms of an Act of Congress which directed the examination of claims resulting from damage done on the "high seas."

[1] See Moore, *Digest*, I, § 153.
[2] See Moore, *Arbitrations*, IV, 4332.

CHAP. XV

Similar claims, legal by prescription, with respect to Conception Bay in Newfoundland, were advanced by the British Privy Council in a suit brought in 1877 by the Direct United States Cable Company against the Anglo-American Telegraph Company.[1] In the case of Mortensen *v.* Peters,[2] the master of a Norwegian vessel was convicted for acts in violation of municipal law committed in Moray Firth outside the three-mile limit. In this instance the bay was seventy-four and one half miles wide between the designated headlands, but the court had no alternative other than to follow an Act of Parliament assuming territorial sovereignty over the firth. Norway protested against the arrest of its citizens upon the high seas; whereupon the British Foreign Office released the prisoners and interpreted the Act of Parliament as applying only to British subjects.[3]

Conventional agreements

A number of treaties have been entered into prescribing the extent to which bays may be claimed as territorial waters. An Anglo-French fishery treaty of 1867 reserved exclusive fishing rights in bays the entrance of which was not more than ten miles in width.[4] In 1882 a general convention, concluded at the Hague between the six interested powers, adopted the same rule with respect to exclusive fishing rights in the bays along the coasts of the North Sea.[5] A treaty between Spain and Portugal in 1885 fixed upon twelve miles as marking the area of exclusive rights,[6] while a treaty of 1907 between Russia and Japan adopted the rule of reserving rights in certain bays whose depth was three times as great as their width at entrance.[7] There is obvious need for further legislation by general international convention. The Institute of International Law, consistently with its recommendation in the case of the marine league, suggested in 1894 the adoption of a general twelve-mile entrance rule, but allowed for exceptions in cases where long-continued usage had sanctioned more extensive claims.[8]

[1] L. R. 2 App. Cases, 394. Snow, *Cases*, 45; Moore, *Digest*, I, 740.

[2] 14 Scots L. T. R., 227 (1906). *Am. Journal*, I (1907), 526; Evans, *Cases*, 29, 151.

[3] With these instances of prescriptive rights to bays must be included the exclusive sovereignty exercised by Japan over the Inland Sea of Japan. The claim of Canada to consider Hudson Bay as a territorial sea rests upon more doubtful, if not actually invalid, grounds. See T. W. Balch, "Is Hudson Bay a Closed or an Open Sea?" *Am. Journal*, VI (1912), 409-459. For general comment, see Sir C. Hurst, "The Territoriality of Bays," British Year Book, 1922-23, p. 42.

[4] Martens, *Nouv. Rec. Gen.*, XX, 466.

[5] *Ibid.*, 2nd ser., IX, 556.

[6] *Ibid.*, XIV, 77.

[7] *Am. Journal*, II, Supp., 274.

[8] Art. 3. *Resolutions*, 113.

North Atlantic Fisheries case

The problem as to what should constitute a bay figured prominently in the North Atlantic Fisheries Arbitration of 1909. Mixed questions of customary law and the interpretation of treaty obligations were presented. By the treaty of 1818 the United States renounced the liberty to fish within "three marine miles of any of the coasts, bays, creeks, or harbours" of Newfoundland, Labrador, and adjoining British coasts not included within the limits earlier specified in the treaty.[1] This provision was interpreted by counsel for the United States as referring to territorial waters within a line measured from low-water mark following all the indentations of the coast. This interpretation was, however, rejected by the arbitration tribunal as not expressing the intention of the governments negotiating the treaty of 1818, at which time there were precedents for considering bays exceeding six miles in width as territorial. The award provided that the line should follow the sinuosities of the coast, except that in the case of bays the three marine miles were to be "measured from a straight line across the body of water at the place where it ceases to have the configuration and characteristics of a bay."[2] Owing to the vagueness of this definition of a bay, a number of bays were specifically provided for, while in the case of others the rule, already adopted by the North Sea Convention of 1882, was put into effect, that the three-mile limit of exclusion should be measured from a straight line drawn from point to point where the bay was ten miles in width.

b. Territorial straits

Where the maritime boundary comes into contact with a strait separating the territory of a single state it is governed by the same principles that control bays and gulfs. In general, if the strait is less than six miles in width its waters are territorial waters subject to the exclusive jurisdiction of the state; although in a number of cases custom has given a prescriptive title to territorial sovereignty over straits greater than six miles in width. The Great Belt of Denmark, being of an average width of ten miles, is part of the territory of Denmark, so that the two parts of the state, east and west of the Belt, form continuous territory. So also the Bosphorus and the Dardanelles are territorial waters of Turkey; while the Strait of Kertch, connecting the Sea of Azov with the Black Sea, is Russian. The United States and Great Britain claim territorial sovereignty, divided by the middle boundary line, over

[1] Art. I. Malloy, *Treaties*, I, 631.

[2] For details of the award, see Scott, *Hague Court Reports*, 141 ff.; Wilson, *Hague Arbitration Cases*, 134.

the Strait of Juan de Fuca, which has an average width of fifteen miles. It should be noted that the question of territorial jurisdiction over straits is closely associated with the more important question of the servitudes upon such waters by which freedom of navigation is secured for the commerce of all nations.[1] Consequently in certain cases, such as Long Island Sound and the Strait of Solent, where the strait does not form an international highway, third states have been indifferent to the assertion of territorial claims by the state in possession of the land on both sides.

[1] See below, pp. 271 ff.

CHAPTER XVI

RESTRICTIONS UPON JURISDICTION OVER TERRITORY: EASEMENTS AND SERVITUDES

a. Servitudes defined

Thus far the jurisdiction of a state over territory has been discussed as if it implied a right of absolute political control, whether over land, or water, or air. This is, in fact, the normal situation. Territorial sovereignty or jurisdiction carries with it a presumption of exclusive rights of use and disposal of the object over which sovereignty is exercised. Nevertheless, by exception, the jurisdiction of a state over its territory may be subject to restrictions in favor of other states in substantially the same way that the jurisdiction of the state over persons within its territory is subject to restrictions in the interest of other states claiming the allegiance of such persons or otherwise concerned in the treatment accorded them. These restrictions upon territorial jurisdiction have, by the analogy of similar restrictions long known to municipal law, been designated as "servitudes"; and they may be defined as obligations on the part of the state in possession of the territory to permit a certain use to be made of it by or in favor of another state or states. The corresponding right on the part of the other state to make such use of the territory of the first state may, for convenience, be designated as an "easement";[1] but it should be noted that the latter term has not yet found its way into international law. The term "servitude," and the object indicated by it, have now obtained recognition in international law; but there is still no general agreement as to the restrictions that may properly be designated as servitudes, or as to the character of the limitations they impose upon the state subject to them.

Legal nature of servitudes

It would seem that servitudes, while involving a restriction upon the use of land or water, do not result in any loss of that theoretical jurisdiction and practical control on the part of the state over its territory which is the mark of sovereignty. In this respect the

[1] The term "easement" is, in municipal jurisprudence, more strictly limited to the special group of servitudes granting rights of way, the use of water, etc. Holland, *Jurisprudence*, 8th ed., 196. A broader meaning is, however, attached in common legal use.

CHAP. XVI

modern conception of a servitude differs from the earlier medieval one based upon the relation between feudal lord and tenant. In the Northeastern Fisheries Arbitration the United States attempted to set forth the conception of a servitude as carrying with it a right of administrative control on the part of the state in whose favor it existed. But the argument was rejected by the arbitration tribunal as contrary to the modern principle of sovereignty.[1] As a general rule a servitude is an obligation attached to the territory as such, giving rise to a corresponding right *in rem*, so that the transfer of the territory from one state to another must be made subject to the rights of the third state.[2] For the same reason servitudes are generally perpetual obligations. It may be convenient to note the distinction made in municipal jurisprudence between a "real" servitude, which is a burden imposed upon a piece of land not for the benefit of any individual as such, but for the benefit of another adjoining piece of land, and a "personal" servitude, which is a burden imposed upon movable as well as immovable property for the benefit of a particular individual.[3] In the case of real servitudes the land subject to the burden is known as the "servient tenement," and the land which benefits by the burden is the "dominant tenement." It would seem that a lease of land, such as the lease of Guantánamo from Cuba by the United States, or the lease of the Canal Zone from Panama,[4] is more properly not to be classed as a servitude, since the lessor state loses possession and use of the land by the lease, although it retains formal sovereignty over it.

Customary and conventional servitudes

A distinction should be observed between customary or prescriptive servitudes, created as a result of long-continued usage, and conventional or contractual servitudes created by express agreement between the parties. In both cases the servitude imposed may be in favor of a single state or of third states in general. Again, a particular servitude, such as the obligation to grant a right of innocent passage though territorial waters, may be one to which all states in general are subject and of which all states alike may enjoy the benefit. Where this is the case it has been questioned [5] whether the gen-

[1] See Award, *sub* Question I. Scott, *Hague Court Reports*, 141, 156.
[2] See Oppenheim, *International Law*, I, § 207.
[3] See Holland, *Jurisprudence*, 8th ed., 194 ff.
[4] See above, p. 243.
[5] Hershey, for example, criticizes Hall's designation of "the right of innocent use of territorial seas" as a servitude, and lays it down that "the characteristic mark of an International Servitude is that it is a perpetual limitation on sovereignty in the interest of some particular State or States." *Essentials of International Law*, 176, n. 20.

eral restriction should properly be called a servitude. Usage is too recent to decide the point, but convenience would seem to justify the application of the term in such cases. So long as international law recognizes no common rights of all nations to the use of other property than the high seas, general restrictions upon private state property can be more easily explained as servitudes than in any other way.

b. General servitudes: servitudes upon rivers

Until the nineteenth century navigable rivers as highways of commerce were almost without exception subject to the complete territorial jurisdiction of the single state in possession of both banks, or of the two states in possession of the opposite banks. Grotius argued on abstract principles in favor of freedom of navigation for all states on rivers as well as on the high seas.[1] Vattel, however, while asserting a right of innocent passage for third states upon territorial rivers, designates the right as an "imperfect" one which for "good reasons" might be denied by the riparian owner or owners.[2] It was not until the Treaty of Paris in 1814, and the Final Act of the Congress of Vienna in 1815, that these theoretical rights of mankind were translated into definite legal rights in respect to particular rivers. The Rhine and the Scheldt had been proclaimed by the Treaty of Paris to be open to navigation from the point at which they became navigable to the sea; and this freedom was confirmed by the Treaty of Vienna and extended to the Main, the Moselle, and the Meuse from the point where each of them became navigable to its mouth.[3] A commission was appointed to act in the name of the riparian states in the execution of the provisions relating to the navigation of the rivers. The articles of this agreement, while apparently opening the rivers designated to the commerce of all nations, were at times narrowly interpreted as conferring common rights of navigation only upon the riparian states. In 1856, following the Crimean War, the Treaty of Paris applied to the Danube the principles laid down by the Congress of Vienna, and a second international commission was created to prepare and administer regulations for the navigation of the river.[4] Further provisions relating to the navigation of the Danube, and to its neutralization in time of war, were adopted at the Congress

[1] *De Jure Belli et Pacis* (Eng. trans.), Bk. II, Chap. II, § XIII.

[2] *Droit des Gens* (Eng. trans.), Bk. II, §§ 123, 127-129, 132, 134.

[3] Art. CVIII-CXVI. *Br. and For. State Papers*, II, 7, 52-53; Martens, *Nouv. Rec.*, II, 427; Hertslet, *Map of Europe by Treaty*, I, 208.

[4] Art. XV-XVIII. *Br. and For. State Papers*, XLVI, 8, 12; Martens, *Nouv. Rec. Gen.*, XV, 776; Hertslet, *op. cit.*, II, 1250.

of Berlin in 1878.[1] A new treaty was entered into in 1883, creating the famous Mixed Commission of the Danube, an administrative body of a unique character, in that it appeared to possess a degree of international personality, having the power to reach decisions by a majority vote and to impose and enforce penalties for the violation of its regulations.[2] Following the separation of Belgium from Holland in 1831, the Scheldt, which had been internationalized in 1815, became nationalized to the extent of a concession by the Treaty of London of 1839 to Holland to levy tonnage duties upon vessels coming to and leaving Belgian ports.[3] These tolls were, however, abolished in 1863, by means of a treaty between the two states providing for their capitalization at a fixed sum.[4]

North American rivers

Beginning in the second half of the nineteenth century, rapid progress was made in opening up to the commerce of the world the boundary rivers of North and South America. The controversy over the navigation of the Mississippi began with a demand on the part of the United States in 1792 for a joint right of navigation with Spain, then in possession of both banks at the mouth of the river. The demand was met by the treaty of 1795,[5] the relevant article of which lapsed when the river became nationalized by the subsequent acquisition by the United States of Louisiana and the Floridas.[6] After persistent efforts on the part of the United States, and in return for the concession of special privileges to British subjects in respect to the navigation of Lake Michigan, the navigation of the St. Lawrence was finally opened to the vessels of the United States by the Reciprocity Treaty of 1854.[7] The treaty

[1] Art. LII-LVII. *Br. and For. State Papers,* LXIX, 749; Hertslet, IV, 2759.

[2] *Br. and For. State Papers,* LXXIV, 20; Hertslet, IV, 3104; Sayre, *Experiments in Int. Administration,* Chap. IV.

[3] Annex, Art. IX. *Br. and For. State Papers,* XXVII, 992.

[4] *Ibid.,* LIII, 8, 15. Following the treaty the United States entered into a separate convention with Belgium for the extinguishment of the Scheldt dues. See Malloy, *Treaties,* I, 75, where the text of the Netherlands-Belgium treaty is also given.

[5] The king of Spain agreed that the navigation of the river "shall be free only to his subjects and the citizens of the United States, unless he should extend this privilege to the subjects of other powers by special convention." Art. IV. Malloy, *Treaties,* II, 1640.

[6] It should be noted that the United States had agreed with Great Britain, by Art. VIII of the treaty of 1782-83, that the Mississippi, "from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States." The right thus acknowledged to Great Britain was, however, based upon an inaccurate assumption that the river had its source in British territory, and it accordingly was lost when the mistake was discovered in the subsequent survey of the boundary. Moore, *Digest,* I, § 130.

[7] Art. IV, Malloy, *Treaties,* I, 668.

terminated upon notice given by the United States in 1866, and a new agreement was reached in the Treaty of Washington of 1871, which provided that the river, from the point where it ceased to be the international boundary, should "forever remain free and open for the purposes of commerce to the citizens of the United States." At the same time it was provided that the Yukon, Porcupine, and Stikine rivers in Alaska should be open to the commerce of British subjects.[1] A more recent boundary convention of January 11, 1909, opened up to the joint use of the citizens of both countries all the navigable waters forming part of the boundary between the United States and Canada.[2] The Rio Grande, on becoming a boundary river after the admission of Texas into the Union in 1845, was by customary law open to the vessels of both countries; but a special agreement with Mexico was necessary to permit the United States to obtain access to the Gulf of California through the waters of the lower Colorado River.[3] It should be noted that the negotiations preceding the opening of these and other rivers, although attended in some cases by an assertion of rights under international law, resulted in the conclusion of definite contractual agreements which avoid mention of general principles and confine the privileges granted to the citizens of the contracting states.[4]

South American and African rivers

The opening of the important South American rivers to international commerce was accomplished upon a more liberal basis. Their geographical location rendered them particularly susceptible to the claim of common rights of navigation for a number of states. In 1852 the Argentine Confederation opened the Paraná and the Uruguay not only to the navigation of the riparian states, but to the merchant vessels of other nations as well. In 1858 Bolivia, being in possession only of the upper waters of the Amazon and La Plata rivers, announced in a treaty with the United States that it was ready to regard them as "highways or channels opened by nature for the commerce of all nations."[5] Brazil resisted for some time the pressure brought to bear upon it, but in 1867 the government by unilateral decree opened the Amazon to the vessels of all nations.[6] Shortly after, in 1869, by unilateral decree Venezuela opened the Orinoco River and its branches to the commerce of all

[1] Art. XXVI. Malloy, *Treaties*, I, 700.
[2] Charles, *Treaties*, 39.
[3] Art. IV, treaty of 1848. Malloy, *Treaties*, I, 1107.
[4] The practice of the United States is summarized by Hyde, *Int. Law*, I, § 165.
[5] Art. XXVI. Malloy, *Treaties*, I, 113.
[6] Moore, *Digest*, I, § 131.

CHAP. XVI

nations, although several restrictions upon international commerce were later imposed.[1] The important African rivers, the Congo and the Niger, were by the Final Act of the Berlin Conference of 1885 opened to the free navigation of "the merchant ships of all nations equally," not only in respect to ships coming from the open sea but in respect to the coasting trade as well, and at the same time the provisions of the treaty were announced as henceforth forming "a part of the international law."[2] A special international commission was appointed to exercise administrative control over the observance of the regulations provided for in the treaty.[3]

Provisions of the peace treaties of 1919

The granting of new easements upon territorial rivers of Europe by the several treaties of peace of 1919 was attended by such exceptional conditions as to justify special comment. In the treaty of Versailles an effort was made to grant to certain of the new states, such as Poland and Czechoslovakia, advantages of navigation which would facilitate the access to the ocean of these inland countries.[4] At the same time, the privileges of the upper and lower riparian states were extended to non-riparian states as well, so that the rivers designed by the treaties were internationalized in the strict sense.[5] On the other hand, special servitudes were laid upon Germany in respect to the treatment in her ports of the vessels of other nations upon a footing of equality with national vessels as regards port facilities and duties and charges of whatever nature.[6] No attempt was made to introduce reciprocity by the grant of similar privileges to Germany, nor was any attempt made to extend the provisions applicable to German rivers to other rivers in possession of the Allied and Associated Powers to which they were equally applicable.[7]

New international rivers

The rivers declared by the treaty with Germany to be international, i.e., open to the vessels of all nations upon a footing of perfect equality with vessels of the riparian state, were the Elbe and the Ultava, connecting Prague with the sea, the Oder from the point of its confluence with the Oppa, the Niemen from Grodno to the sea, the Danube from Ulm, as well as "all navigable ports of

[1] Moore, *Arbitrations*, II, 1696; *Digest*, I, § 131.
[2] Preamble; Art. II, XIII-XXXV. *Br. and For. State Papers*, LXXVI, 4.
[3] See Sayre, *Experiments in International Administration*, 84 ff.
[4] Art. 327-353; 363-364.
[5] Art. 331.
[6] Art. 327-330.
[7] The provisions of the treaty thus appear to represent in part penalties imposed upon the defeated state rather than general constructive reforms, although they doubtless will form precedents for future international action along similar lines.

these river systems which naturally provide more than one state with access to the sea," together with lateral canals and channels forming connecting links.[1] A special concession was made to vessels of the Allied and Associated Powers of the right to enjoy in German ports and on inland navigation routes the same privileges enjoyed by German vessels in respect to the transportation of both goods and passengers.[2] A temporary administration of the new international waterways was provided for, to be followed by the adoption of a general convention which was to be submitted to the League of Nations for approval.[3] Separate international commissions were also created for the administration of the regulations governing the navigation of the designated rivers.[4] In the case of the Danube the existing European commission was temporarily limited in its membership to Great Britain, France, Italy, and Rumania.[5] Special provisions were adopted enlarging the personnel and powers of the Rhine Central Commission, as well as regulating the hydrotechnical use of the waters of the Rhine, and the conditions under which a Rhine-Danube and a Rhine-Meuse navigable waterway might be constructed.[6]

The flow of rivers

It is doubtful whether international law can be said to have recognized any servitude corresponding to that existing in civil and common law in the form of a right to the uninterrupted flow of streams and rivers. Conscious of the possession of the traditional rights of sovereignty, states in possession of the upper waters of a river have not recognized any general obligation to refrain from diverting its waters and thereby deny to the states in possession of the lower waters the benefits of its full flow. Such restrictions as have been recognized have been in every case the result of treaty stipulations. The controversy between the United States and Mexico over the diversion by the former of the upper waters of the Rio Grande for purposes of irrigation was settled in 1906 by the conclusion of a treaty for the equitable distribution of the waters of the river. The United States agreed to deliver to Mexico annually a specified number of cubic feet at a given point on the river, distributing the delivery through the year according to a fixed schedule.[7]

[1] Art. 331-332. [2] Art. 327. [3] Art. 333-337.
[4] Art. 340-362. [5] Art. 346.
[6] Art. 354-362. Corresponding provisions are to be found in the treaty of peace with Austria of September 10, 1919, Art. 290-310. The provisions of the two peace treaties are summarized in Hyde, *Int. Law*, I, §§ 173-180.
[7] Malloy, *Treaties*, I, 1202.

CHAP. XVI

A more important convention was concluded between the United States and Great Britain in 1909 regulating the use of the boundary waters between the United States and Canada. It was provided that each state, while retaining jurisdiction over the waters on its side of the line, should grant to parties on the other side of the line, if injured by any interference or diversion of waters, the same rights and legal remedies as if the injury took place on the first side. Moreover, the parties agreed not to obstruct or divert the waters in the future without the approval of an international joint commission established by the convention, a majority of whose members should have power to render a decision.[1]

Special provisions with respect to the diversion of the upper waters of the Rhine were inserted in the Treaty of Versailles of 1919. France was given the right to take water from the Rhine to feed navigation and irrigation canals or for any other purposes, and was to have exclusive right to the power derived for hydrostatic works ("works of regulation") on the river, subject to a fixed payment to Germany in money or water-power.[2] The same rights were to be accorded on demand to Switzerland in respect to that portion of the river along its boundary.[3]

c. Bays and gulfs

Territorial bays do not appear to be subject to any general servitude in favor of states other than the territorial owner. But in so far as passage through them may be a condition of access to ports of the territorial state, foreign vessels enjoy the same privilege, or perhaps limited right, to their use which they enjoy in respect to admission to the port itself.[4] By reason of their geographical configuration, territorial bays cannot form a highway of commerce with third states, except in the rare case where the boundary line

[1] Charles, *Treaties*, 39.

The student of United States constitutional law may compare profitably the decision of the Supreme Court in the case of Kansas *v.* Colorado, 206 U. S., 46 (1907), in which the court held, in a suit brought by Kansas to restrain Colorado from diverting the waters of the Arkansas River for irrigation purposes, that the diversion was not sufficient in amount to injure perceptibly property lying along the lower valley. For a summary of the case, see Scott, *Judicial Settlement of Controversies between States of the American Union*, 431 ff. A more recent case is that of Wyoming *v.* Colorado, 259 U. S., 419 (1922), dealing with the diversion by Wyoming of the upper waters of the Laramie River.

[2] Art. 358.

[3] *Ibid.* In connection with the constructive development of the law it may be observed that the Institute of International Law, at its meeting at Madrid in 1911, adopted a draft code covering the regulation of international streams and rivers from the point of view of available water-power for industrial and agricultural purposes. *Resolutions*, 168.

[4] See above, p. 193.

between two states happens to run through the bay. Should this happen, the territorial waters of each state are subject to a right of innocent passage on the part of vessels of third states seeking access to the ports of one or other of the two states.

Lakes and landlocked seas

No question of a right of passage on the part of third states has arisen in connection with inland lakes, such as Lake Michigan,[1] and landlocked seas such as the Sea of Azov, which are wholly surrounded by the territory of a single state. But if such a lake or sea should form the boundary between two or more states, as in the case of Lake Constance, the territorial waters of each of the riparian states are subject to a servitude permitting innocent passage on the part of the other riparian states. The coasting trade, from port to port of one of the riparian states, is, however, generally reserved to the vessels of the respective states. Four of the five Great Lakes, i.e., Superior, Huron, Erie, and Ontario, although not absolutely landlocked, being connected with the sea by artificial waterways, are regarded in international law as such, and are subject to the exclusive territorial jurisdiction of the two states whose boundary runs through them. Each state enjoys a right of use of the lakes in their entirety for purposes of navigation, while fishing rights on either side of the water boundary are reserved to the respective countries. In the case of United States *v.* Rodgers,[2] the Supreme Court held that a crime committed upon an American vessel in the Detroit River connecting Lakes Huron and Erie was committed upon the "high seas" within the scope of that term as used in Revised Statutes §5346, defining the places within which federal criminal jurisdiction should be operative. There was, however, no suggestion in the decision that the waters in question were not subject to the territorial jurisdiction of Great Britain and the United States exclusively.

A more difficult problem is presented when a lake or sea is not wholly landlocked, being connected with the open sea by a narrow navigable strait. Where, as in the case of the Sea of Azov, the body of water is wholly surrounded by the territory of a single state, it remains in the class of inland lakes. But where surrounded by the territory of more than one state, practice would appear to indicate that the lake or sea is not only open to the commerce of the

[1] By special agreement between the United States and Great Britain, Art. I of the convention of January 11, 1909 (see above, p. 268), a right of navigation on Lake Michigan was granted to Canadian inhabitants and their vessels. Charles, *Treaties*, 39.

[2] 150 U. S., 249 (1893). Scott, *Cases*, 222.

CHAP. XVI

states bordering its shores, but is open to the commerce of other nations as well. At the same time, it apparently loses its territorial character. When Russia obtained a foothold upon the shores of the Black Sea in 1774 not only was the former exclusive jurisdiction of Turkey shared by Russia, but the territorial waters of both powers were, by a series of treaties, opened to third states for purposes of commerce and trade.[1] By 1878, when Rumania and Bulgaria also became riparian states, the Black Sea came to be regarded as part of the "open sea." [2] In spite of occasional efforts on the part of the riparian powers to close it to foreign warships in time of war, the Baltic has remained an open sea.

The marginal sea

There is a well established servitude imposed upon the marginal sea along the coast of maritime states, by which the ships of every nation enjoy a right of innocent passage through such territorial waters. The enjoyment of this right may be conditioned upon the observance of special regulations laid down by the littoral state for the protection of navigation and the execution of municipal laws relating to customs, quarantine, and other local interests. There is a difference of opinion among writers whether the marginal sea is open to the innocent passage of foreign warships.[3] As a matter of practice, foreign men-of-war regularly make use of these territorial waters in time of peace when their voyage to their lawful destination is shortened or facilitated by it, and this usage would seem to indicate an inchoate, if not an actual, right to such innocent use.[4] In time of war belligerent states may undoubtedly take such measures as are called for by self-defense, not only to exclude neutral warships from passage through the marginal sea, but, if necessary, neutral merchant ships as well.[5] On the other hand, neutral states may take similar measures with respect to belligerent warships, in order to insure that no occasion for the commission of hostilities shall arise.[6]

Straits connecting territorial bays and seas with the open sea

[1] The limitation imposed by the Great Powers upon Russia in 1856, forbidding the admission of vessels of war into the Black Sea, is to be classed as a special rather than as a general negative servitude. The terms of the treaty were general, but they were in reality directed principally against Russia. See Treaty of Paris, Art. XI. Hertslet, *op. cit.*, II, 1250.

[2] Such is the view of Oppenheim, *International Law*, I, § 181, and other publicists, although the language of diplomatic documents is ambiguous.

[3] Oppenheim, *International Law*, § 188.

[4] The Institute of International Law, at its meeting at Paris in 1894, recommended that "all ships without distinction have the right of innocent passage through the territorial sea." Art. 5. *Resolutions*, 113.

[5] See above, p. 253.

[6] See below, p. 555.

d. Straits and canals

are governed by the same rule as the territorial bay itself. There is, therefore, no definite servitude imposed upon the Strait of Kertch,[1] connecting the Sea of Azov with the Black Sea, nor upon the Strait of Juan de Fuca connecting Puget Sound with the ocean, although in the latter case the boundary between the United States and Great Britain runs through the strait.[2] The only problems of any considerable difficulty are those that have arisen in connection with straits connecting one open sea with another. By immemorial custom, sanctioned by a succession of treaties, the powers of Europe acquiesced in the collection by Denmark of tolls levied upon vessels passing through the Danish Sound and the two other narrow passages connecting the North Sea with the Baltic. In 1853 the United States announced its purpose to press to a conclusion its earlier protest against the collection of these Sound Dues, with the result that in 1857 they were abolished by Denmark in consideration of the payment by the parties interested of a total sum equivalent to the capitalization of the cost to Denmark of maintaining lights and buoys for the safe navigation of the waters in question.[3] Perhaps the best precedent illustrating the easement of innocent passage enjoyed by all states through straits connecting open seas is to be seen in the declaration of Chile and the Argentine Republic in 1881, following the protest of the United States in 1879 that it would not tolerate exclusive claims by any nation whatsoever to the Straits of Magellan and would hold responsible any government that undertook to lay any impost or check on United States commerce through the straits.[4] The treaty of 1881 between the two states provides that "Magellan's Straits are neutralized forever, and free navigation is guaranteed to the flags of all nations."[5]

The Dardanelles and the Bosphorus

The status of the Dardanelles and the Bosphorus has been regulated by a series of international conventions having principally in view the political object of maintaining the integrity of Turkey, but incidentally the economic object of opening the straits to the merchant marine of all nations.[6] These bodies of water were

[1] See above, p. 259.
[2] See above, p. 259.
[3] Moore, *Digest*, I, § 134.
[4] *Ibid.*
[5] Art. V. *Ibid.* The use of the term "neutralized" in this connection apparently indicates no more than an intention on the part of the contracting powers to warn third states against the commission of hostilities within the said waters. Warships are allowed free passage upon implied acceptance of the condition that no act of hostility be performed. The phrase "neutralized and internationalized" better describes the situation.
[6] The historical evolution of the status of the straits is given in Phillipson and Buxton, *The Question of the Bosphorus and Dardanelles*, Part II.

CHAP. XVI

the arena of sharp diplomatic conflicts during the nineteenth century, Russia seeking to control them in the alleged interest of self-defense and commercial freedom, and Great Britain, supported by other Great Powers, seeking to check the threatened advance of Russia toward Constantinople and the dominance by that country of the Balkan states and the eastern Mediterranean. The successive agreements concluded by the Great Powers must be read in connection with the status imposed at the same time upon the Black Sea.[1]

International conventions

As early as 1809 Great Britain, in concluding with Turkey the Treaty of the Dardanelles, recognized the "ancient rule of the Ottoman Empire" excluding foreign ships of war from the straits. More formal recognition of the same rule was accorded by the signatory powers of the Convention of London in 1841. At the close of the Crimean War the Treaty of Paris in 1856 revised the convention of 1841,[2] expressly confirming the right of the sultan to exclude warships from the straits, but permitting the passage of light cruisers put at the service of the foreign embassies or engaged in protecting the freedom of navigation of the Danube. In consequence of the repudiation by Russia in 1870 [3] of the binding force of the Treaty of Paris in respect to the exclusion of Russian warships from the Black Sea, the Treaty of London in 1871, while continuing the general exclusion of warships from the straits, gave power to the sultan to make an exception in time of peace in favor of the vessels of war of friendly and allied powers, if necessary to secure the execution of the terms of the treaty of 1856.[4]

Later events indicated that the problem of the straits had not yet been solved. In 1902 Turkey yielded to the request of Russia that a number of torpedo-boats be allowed passage on condition that they should be disarmed and fly the merchant flag. Again, in 1904 two vessels of the Russian volunteer fleet passed through the straits disguised as merchant vessels and were then converted into warships. In addition to these efforts of Russia to break through the restrictions imposed upon her, there was complaint on the part of neutral states when the straits were temporarily closed to their merchant ships by Turkey in 1912 during the war with Italy.[5]

[1] See above, p. 270, n. 1.
[2] Art. 10 and the annexed Straits Convention.
[3] See below, p. 347.
[4] The United States, not being a party to the several treaties, acquiesced only under protest in the exclusion of its warships from the straits.
[5] See Holland, *The European Concert in the Eastern Question*, 224-226.

The Straits Convention of 1923

In consequence of the failure of the signatory powers to ratify the Treaty of Sèvres in 1920, the provisions of that treaty [1] were reconsidered at Lausanne, and on July 24, 1923, accompanying the treaty of peace, a separate Straits Convention was signed in which the contracting parties proclaimed "the principle of freedom of transit and of navigation by sea and by air" through the straits. The new convention abandons the principle of excluding warships in favor of the principle of admitting all ships alike on condition of observing the restrictions laid down in the convention. Merchant vessels are granted complete freedom of navigation both in time of peace and in time of war, in the latter case on condition that if Turkey is a belligerent the vessels shall not give assistance to the enemy. Warships have a similar freedom in time of peace, subject to restrictions as to numbers. In time of war they may likewise have passage if Turkey is neutral on condition of not performing any hostile act; and if Turkey is belligerent they may pass if themselves neutral. Further, the convention created "demilitarized zones" along both shores of the Dardanelles and the Bosphorus, within which no fortifications or military establishments could be maintained. For the execution of the provisions of the convention a special international Straits Commission was constituted at Constantinople, which is to exercise its functions under the auspices of the League of Nations and render an annual report to that body. In order to protect Turkey against a violation of the conditions of passage the contracting powers agree to meet such possible violation by all the means which the Council of the League of Nations may decide shall be necessary.[2]

Inter-oceanic canals

Canals, being artificial waterways, built at the cost of the owner, are not subject to the servitude of innocent use as are natural straits. Those which are purely internal in character, such as the Chesapeake and Ohio Canal, the Erie Canal, or the numerous canals of Holland, Belgium, and France, connecting bodies of water one or both of which are not open to the commerce of other nations than the state through whose territory they are built, raise no issues of international law. They are in the class of rivers, such as the Mississippi, whose navigation is the exclusive right of the territorial sovereign. When, however, the canal connects two open seas, the state in possession of it may decide, for reasons of its own,

[1] Art. 37-60.

[2] For the text, in summary, see *Current History*, October, 1923; in full, British *Treaty Series*, No. 16, 1923; *Am. Journal*, XVIII (1924), Supp., 53

CHAP. XVI

financial or otherwise, to open the canal to the commerce of other nations upon payment of fixed tolls, and subject to such other conditions as the state may find it necessary to prescribe. The Kiel, or Emperor William, Canal, connecting the Baltic with the North Sea, having been constructed primarily for strategic purposes, was nevertheless thrown open by Germany from 1896 to 1914 to the commerce of other nations. But this was no more than a voluntary concession on the part of Germany, which retained the right to withdraw the canal from international use at any time. In like manner the Corinth Canal, connecting the Gulf of Corinth with the Aegean Sea, has been opened by Greece to general commerce; but no obligation has been assumed to maintain it open or to administer it with reference to the interests of any other nation than the owner.

The Suez Canal

On the other hand, the two most important interoceanic canals, the Suez and Panama canals, have been subjected by the states in control of them to a sort of self-imposed servitude, in consequence of which the states of the world at large enjoy a privilege, closely approximating to a legal right, of innocent use, subject to definite conditions laid down in a formal international document. The fortunes of the Suez Canal have been varied. Originally built in 1869 under a concession from the khedive of Egypt obtained by a French stock company under the direction of Ferdinand de Lesseps, it came partly under the control of Great Britain when that country purchased, in 1875, the shares of the khedive, and later came all but nominally under its control when Great Britain assumed a veiled protectorate over Egypt after 1883. Great Britain then proposed, in consequence of difficulties arising during the revolt of Arabi Pasha, that the canal be neutralized; but it was not until October 29, 1888, that the Convention of Constantinople was finally signed by Great Britain, France, Germany, Italy, Austria-Hungary, Russia, Spain, Holland, and Turkey.[1]

This convention represents a definite agreement on the part of the signatory powers that the canal should be open in time of peace as well as of war to the merchantmen and men-of-war of all nations; and, further, that in order to insure such use, especially on the part of men-of-war, the canal should be under all circumstances, even if Turkey was at war, immune from the commission of hostilities, being treated strictly as if neutral territory. No permanent fortifications were to be erected; but the territorial sovereign, the

[1] *Br. and For. State Papers*, LXXIX, 18; *Am. Journal*, III (1909), Supp., 123.

sultan or the khedive, could take such police measures as might be necessary to defend Egypt and to maintain public order. The signing of the convention by Great Britain was accompanied by a reservation that the provisions of the convention should apply only in so far as they were compatible with the policy of Great Britain toward Egypt during the transitional stage through which that country was passing.[1] In 1904, however, in a treaty with France concerning Egypt and Morocco, Great Britain gave its formal adherence to the convention.[2] In consequence it may now be said that while the Suez Canal remains a private undertaking, whether subject to the territorial control of Great Britain or of the new independent state of Egypt, it is nevertheless subject to a servitude of common use on the part of all nations, not only those signatory of the convention of 1888, but all others which have acquired by the passage of time a prescriptive right to the enjoyment of the facilities it offers. The term "neutralization" regularly used in connection with the Suez Canal, has been frequently criticized;[3] but it apparently describes a status corresponding to that of neutral territorial waters, through which belligerent warships have a right of innocent passage, but in which they have no right to commit acts of hostility.[4] Without discarding the term "neutralization," it would seem that the term "internationalization" could properly be used to supplement it.[5]

The Panama Canal

The international status of the Panama Canal is governed by the provisions of the Hay-Pauncefote Treaty between the United States and Great Britain, signed November 18, 1901.[6] This treaty supersedes the earlier Clayton-Bulwer Treaty of 1850,[7] by which the same parties agreed that neither should ever obtain for itself any exclusive control over the proposed canal by erecting fortifications near it or by occupying or assuming dominion over the adjoining country. The canal, when built, was to be protected by the contracting parties, who guaranteed its "neutrality," so that it might

[1] Holland, *Studies in International Law*, 293.

[2] Westlake, *International Law*, 2nd ed., I, 345.

[3] See Phillipson and Buxton, *op. cit.*, 239. Cited by Hyde, *International Law*, I, § 198.

[4] "Neutralization" as applied to territory strategically located, such as Belgium, would appear to have a different object from the neutralization of a highway of commerce such as the Suez Canal. The latter, although of strategic defensive value to the British Empire, had no such character as respected the other parties to the convention of 1888.

[5] Lord Cromer suggested the term "internationalization" in reference to the Suez Canal. *Modern Egypt*, II, 384. Cited by Hershey, *Essentials of International Law*, 211, n. 38.

[6] Malloy, *Treaties*, I, 782.

[7] *Ibid.*, I, 659.

CHAP. XVI

"forever be open and free." Other states were to be invited to join "a work of such general interest and importance," which would be maintained "for the benefit of mankind, on equal terms to all." It was not, however, found feasible to build a canal under the conditions of joint control thus contemplated. The new treaty of 1901 was therefore entered into, permitting the construction, as well as the regulation and management of the canal, under the single auspices of the United States, without, however, impairing the "general principle of neutralization" established in the convention of 1850. Certain definite rules were thereupon adopted "as the basis of the neutralization of such ship canal," corresponding substantially to those embodied in the Suez Convention of 1888.[1] These rules contemplate two distinct objects: the opening of the canal to the common use of the vessels of commerce and of war of all nations on terms of equality, and the protection of the canal against the commission of acts of hostility by belligerents in time of war or its use by belligerents for strategic purposes. In respect to both these objects difficulties have arisen as to the obligations assumed by the United States and Great Britain and indirectly by other states.[2]

The question of tolls

The controversy between the United States and Great Britain over the right of the former to exempt its merchant vessels from payment of tolls in passing through the canal is primarily a question relating to interpretation of treaty obligations, and will be examined later in that connection. The only point in the controversy relative to the international status of the canal is the question whether third states not parties to the treaty have acquired any rights in the case. In this connection it is important to note that the agreement on the part of the United States and Great Britain, in the earlier Clayton-Bulwer Treaty, to invite all other states to enter into stipulations similar to those entered into between the immediate contracting parties,[3] finds no place in the later Hay-Pauncefote Treaty. Nevertheless, it would appear that the "general principle" of neutralization embodied in both treaties implies the recognition of a self-imposed obligation on the part

[1] Art. III.

[2] It should be observed that the subsequent acquisition by the United States from the Republic of Panama of a "grant in perpetuity" of the use, occupation, and control of the canal zone, equivalent to practical sovereignty, did not in any way modify the provisions of the treaty, since it was expressly provided (Art. IV) that no change of the territorial sovereignty of the canal zone should affect the general principle of neutralization.

[3] Art. VI.

of the United States not to discriminate against vessels of any nation in respect to the conditions or charges of traffic. This self-imposed obligation or servitude may with some justice be said to have obtained by lapse of time the character of an inchoate legal obligation. Acting in good faith under it, third states have entered upon commercial undertakings which have contributed, by payment of tolls, to the cost of maintenance of the canal, and which have thus created in some degree a consideration for an implied contract.[1]

The neutrality of the Panama Canal in time of war

The status of the Panama Canal in time of war presents a more difficult problem. The "general principle of neutralization" recognized by the United States as governing its control of the canal differs in several respects from the neutralization imposed upon the Suez Canal. In the first place, there are only two parties to the contract, although the same principle of law which would appear to create quasi-contract rights on the part of third states would seem to create corresponding obligations from their taking advantage of the facilities it offers.[2] In the second place, the right of use of the Panama Canal does not, as in the case of the Suez Canal, apply "in time of war as in time of peace"; so that it would seem that the United States, as sole practical guarantor of the neutrality of the canal, if necessary might close it in time of war.[3] While, therefore, no hostilities may be committed in the canal, and it may not be blockaded, or used by belligerents for any purpose for which neutral territorial waters would be closed to them, yet in the absence of a collective guarantee of all nations to this effect the United States would seem by inference free to take such measures as are necessary to see that third states observe the rules prescribed. This duty may fairly be held to include the right to fortify the canal, although it is difficult to include such action technically within the "liberty to maintain such military police" as might be necessary to protect the canal against lawlessness and disorder, as provided in the treaty. It is expressly provided in the treaty that the plant and buildings of the canal should, in time of war as in time of peace, enjoy complete immunity from attack or injury by belligerents; but it is obviously questionable whether third states,

[1] The student may make comparison between the position of the United States in respect to the administration of the canal and that of the administrator of a public trust created by the donor for the benefit of the community and supported in part by the contributions of the community.

[2] This view is supported by Hyde, *International Law*, I, 345, n. 3.

[3] The necessity would, however, have to be sufficiently great to override the general right of innocent passage recognized for ships of war as well as for vessels of commerce.

CHAP. XVI

at war with the United States, would feel obligated to abide by this provision. Great Britain is clearly bound by it, unless the United States were to use the canal for strategic purposes, in which case the general principle of neutrality might be held to have been set aside.[1] Fortifications were erected by the United States in 1912.[2]

The Kiel Canal under the treaty of 1919

At the Peace Conference at Paris in 1919 the powers took advantage of the opportunity to impose a definite international status upon the Kiel Canal, the administration of which had hitherto been conducted by Germany as a purely domestic concern. The treaty of Versailles provides that "the Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."[3] Further provision is made that the nationals, property, and vessels of all powers shall be treated in respect to charges and facilities of traffic upon a footing of equality with the nationals, property, and vessels of Germany.[4] Only such tolls may be levied as are intended to cover in an equitable manner the cost of maintaining the canal in a navigable condition.[5] Germany is left responsible for maintenance of satisfactory conditions of navigation; but provision is made that in the event of a violation, or dispute as to the interpretation, of the articles of the treaty, the plaintiff state may make complaint, first to a local authority set up by Germany at Kiel, and then, if necessary, to the court instituted for that purpose by the League of Nations.[6]

e. Land territory not subject to general servitudes

Such are the principal general servitudes imposed upon the territorial property of states in favor of other states. Based in part on international custom and in part upon specific conventions, they represent a recognition on the part of the community of na-

[1] The question has been raised whether, in view of the uncertain obligations of third states, it would not be more consistent that the status of the Panama Canal should be regulated by general international convention.

[2] For a discussion of the question of the legal right and practical expediency of fortifying the Panama Canal, see *Am. Journal,* III (1909), 354, 885; IV (1910), 314; V (1911), 298, 615, 620.

[3] Art. 380. [4] Art. 381. [5] Art. 382.

[6] Art. 385, 386. On August 17, 1923, at the instance of a suit brought against Germany by France, Great Britain, Italy, and Japan, the Permanent Court of International Justice decided that the action of the German Government in excluding, in pursuance of its neutrality regulations, the British steamer *Wimbledon,* laden with munitions for Poland, from the use of the Kiel Canal was in violation of the obligations assumed under Art. 380 of the Treaty of Versailles. See *Collection of Judgments* (Series A), No. 1. Also, M. O. Hudson, "The Second Year of the Permanent Court of International Justice," *Am. Journal,* XVIII (1924), 10. It may be noted that the decision of similar disputes with respect to the Panama Canal remains the prerogative of the United States alone.

tions that the conditions of international intercourse preclude in many instances an assertion of unlimited rights over territory which nevertheless is subject in other respects to the jurisdiction of the state. Whether the principle of restricting territorial sovereignty in favor of the general needs of the international community can logically and advantageously be carried still further is a problem of constructive, rather than of positive, international law. It may be noted, however, that in addition to the limited character, in some cases, of the present servitudes upon territorial waters, there is no recognition of any general principle of servitudes upon land territory. When, for example, the United States was seeking in 1901-03 to obtain possession of a part of the Isthmus of Panama for the building of a canal, there was no legal obligation on the part of the state of Colombia to yield to the interests of the world at large in permitting the development, whether by the United States or by any group of nations, of the artificial highway which Colombia itself appeared unwilling or unable to build. The community of nations had no recognized right of eminent domain similar to that possessed by the individual state when taking over the property of individuals for public use.

f. Special servitudes

Special servitudes, generally designated merely as servitudes, are such as are imposed upon a state in favor of another particular state or states. While they are of less intrinsic importance than general servitudes, nevertheless they merit attention because they permit a contrast between the actual restrictions to which the territorial sovereignty of states has been subjected from time to time and the theoretical doctrines of its absolute character. Moreover, they suggest in certain cases the possibilities of constructive international legislation through the conversion of a special servitude in favor of a single state into a general servitude in favor of the community of nations as a whole.

Special servitudes were common in the seventeenth and eighteenth centuries, being a heritage from the feudal relations of the Middle Ages; but with the growth of a more rigid conception of territorial sovereignty they became much less frequent. For the most part, they are created by definite treaty stipulations. This is always the case when the servitude is of a negative character, consisting in an obligation on the part of the state to refrain from exercising its territorial jurisdiction in specified ways. When, however, the servitude is a positive one, consisting in an obligation to permit another state, known as the "dominant" state, to per-

form certain acts upon the territory of the "servient" state subject to the servitude, it is possible that, as in the case of general servitudes, the obligation may be created by prescription. But more commonly it rests upon treaty agreement. As was observed in connection with general servitudes, international usage is not clear as to the precise legal character of special servitudes, authorities differing upon such points as to the extent to which they are inherent in the territory, the effect upon them of transfers of territory from one state to another, and their permanence in the event of war between the parties.

Positive servitudes: the North Atlantic Coast Fisheries case

Positive servitudes have been created for a wide variety of objects. Some are economic in character, involving, for example, a right on the part of the dominant state to fish in the territorial waters of the servient state, or a right to build or operate a railway through the servient state. The servitude imposed upon British territorial waters by the treaty of 1783,[1] recognizing the right of the people of the United States to fish upon the Grand Banks and in the Gulf of St. Lawrence, and granting the liberty to fish on the coast of Newfoundland and on other coasts, bays, and creeks of British territorial waters in America, proved to be the occasion of a long controversy. The parties disputed whether the intervening War of 1812 extinguished the obligations imposed by the treaty of 1783.[2] A new treaty was entered into in 1818,[3] followed by fresh disputes and later treaties of 1854,[4] 1871,[5] and 1885.[6] The points at issue were finally decided by arbitration in 1910, the tribunal rendering an award in favor of Great Britain on the principal points.[7] The tribunal discussed at length the legal character of servitudes, with the result that not only was the contention of the United States rejected, that a servitude existed in the particular case, but the whole doctrine of servitudes was dismissed as being inconsistent with modern political theory, owing to the "essential sovereignty and independence" required by the constitution of the modern state.[8]

[1] Art. III. Malloy, *Treaties*, I, 580.
[2] Moore, *Digest*, I, § 163.
[3] Malloy, *Treaties*, I, 631.
[4] *Ibid.*, 668.
[5] *Ibid.*, 700.
[6] *Ibid.*, 729.
[7] Scott, *Hague Court Reports*, 141-225; Wilson, *Hague Arbitration Cases*, 134; *Am. Journal*, IV (1910), 948. See also *Analytical Index, Am. Journal, 1907-1920*, sub tit. "North Atlantic Coast Fisheries Arbitration."
[8] The decision was reached on the assumption that a servitude by its nature involved a grant of sovereignty over the territory to the extent required by the servitude. That this assumption was based upon theory rather than upon practical conditions, see Oppenheim, *International Law*, I, § 203. The student may compare the Northeastern Fisheries case with the similar right to fish on

Railways

The grant by a state to a foreign power of the right to build and operate a railway through its territories is conspicuously illustrated in the case of China. By successive agreements in 1896 and 1898 the Peking Government granted to Russia and to Germany the right to build and operate railways in Manchuria and Shantung respectively.[1] Japan succeeded to the rights of Russia in 1905,[2] and she took possession of Germany's rights in 1914.[3] More recently, by agreements reached in 1915 and 1918, China granted to Japan Germany's rights of control over the Shantung Railway running from Tsing-tao to Tsinan-fu.[4] This servitude, however, being a serious encroachment upon the territorial independence of China, as well as a continuous interference with her administration of the province, was renounced by Japan in the treaty signed by the two states on February 4, 1922, at the close of the Washington Conference on the Limitation of Armaments.[5]

Rights of way

Distinct from corporeal property rights are the incorporeal rights of way which have been occasionally granted for the transit of persons or of goods across the land territory of the particular state.[6] For obvious, if not altogether logical, reasons, states have never recognized any general servitude imposed upon their land territory in favor of other states, no matter how urgent might be the need of the latter of access to the sea across such territory.[7] When,

the banks of Newfoundland granted in favor of France by the Treaty of Utrecht of 1713. The original right was confirmed and modified by subsequent treaties, but continued to remain a source of controversy until finally abandoned by France in 1904. See Bonfils, *Droit International*, No. 342. See further the decision of the local German court interpreting the treaty of 1816 between Prussia and the Netherlands. Scott, *Cases*, 264, n. In 1905 the Supreme Court of the United States recognized the doctrine of servitudes as applied to fishing rights granted to an Indian tribe. United States *v.* Winans, 198 U. S., 371. Scott, *Cases*, 255.

[1] Willoughby, *Foreign Rights and Interests in China*, 371.

[2] *Ibid.*, 311. [3] *Ibid.*, 380-385. [4] *Ibid.*, 386-393.

[5] Willoughby, *China at the Conference*, 391, 395. *Am. Journal*, XVI (1922), Supp., 84.

[6] Hyde cites the interesting, if relatively unimportant, instance of the grant by the United States to Great Britain in 1871 of a freedom of transit, in the form of an exemption from payment of customs dues, for goods arriving at certain American ports and destined for British North American possessions. *International Law*, I, § 195. Malloy, *Treaties*, I, 700. It may be noted that the important right of way across the Isthmus of Panama granted to the United States by New Granada in 1846 did not include the right to build a canal, but merely the right to take advantage of such facilities as were then or might subsequently be made available. Malloy, *Treaties*, I, 302, 312.

[7] The suggestion has been made from time to time by various peace societies that in return for the cession by Great Britain to the United States of territory lying along the St. Lawrence River, which would give the United States direct access to the navigable portions of the river, the latter should cede to Great Britain the so-called "Panhandle" of Alaska which shuts off north-

however, the opportunity presented itself to the Allied and Associated Powers at Paris to introduce into international law a principle, long approved in the abstract and now of urgent necessity in the concrete, the obligation was imposed upon Germany and upon Austria to grant freedom of transit through their respective territories, by rail as well as by water, to the persons, goods, vessels, and wagons coming from or going to the territory of any of the Allied and Associated Powers. Special provision was made for the exemption of such traffic from payment of customs duties or from undue charges on transport, or from any discrimination in the charges and conditions of transport.[1] Czechoslovakia, in particular, was given in the treaty with Germany the right to lease areas in the ports of Hamburg and Stettin,[2] and, in the treaty with Austria, the right to run its own trains over certain sections of Austrian railways.[3] Austria on its part was granted freedom of transit to the Adriatic across the territories formerly included within the Dual Monarchy.[4]

Other positive servitudes have a political or military object in view, such as the servitude imposed by the Treaty of Vienna in 1815 upon the Sardinian provinces of Chablais and Faucigny in favor of Switzerland, giving that country the right in time of war to place troops temporarily in the provinces. This servitude was recognized as passing with the territory when the provinces were annexed to France in 1860.[5] A number of the older servitudes permitting states to transport troops across neutral territory disappeared with the stricter recognition of the obligations of neutrality in the nineteenth century; but a modern instance is to be seen in the request made by Great Britain upon Portugal to permit the passage of troops across Portuguese territory in 1900 during the war in the Transvaal, in pursuance of the treaty of 1891 which provided for reciprocal freedom of transit across the Zambesi.[6]

western Canada from the Pacific. However desirable the mutual cession might be, the fact that neither party has ever asserted legal rights of way across the territory in question sufficiently proves the statement made in the text.

[1] Art. 321-326. [2] Art. 363.

[3] Art. 322, Treaty of St.-Germain.

[4] Art. 311, Treaty of St.-Germain. While the concession to Germany of reciprocal privileges in respect to the territory of the Allied and Associated Powers was refused, provision was made (Art. 378) that the stipulations of the treaty were to be revised after five years, and that failing such revision reciprocity should become a condition of their continuance unless the time-limit should be extended by the Council of the League of Nations.

[5] Clauss, *Die Lehre von den Staatsdienstbarkeiten*, 8-15; cited by Oppenheim, *International Law*, I, § 207.

[6] Clauss, *op. cit.*, 212-217; cited by Oppenheim, *loc. cit.*

Portugal acceded to the request, but in doing so she undoubtedly laid herself open to a claim for damages by the Boers had they survived the war.

Negative servitudes

Negative servitudes appear to be exclusively confined to political or military objects. The obligation not to fortify a particular town was frequently a condition of peace treaties in the seventeenth and eighteenth centuries. France was forbidden by the Treaty of Utrecht in 1713 to rebuild the fortifications of Dunkirk.[1] The Treaty of Paris in 1814 required that Antwerp should never become a military port. The Treaty of London in 1831 exacted the demolishing of several Belgian fortresses.[2] In 1856 the Treaty of Paris required Russia to demolish fortresses upon the shores of the Black Sea and not to maintain a navy in those waters; but this servitude, forced upon Russia against its will, was thrown off when two of the coercing parties, France and Prussia, were at war in 1870.[3] The convention of London in 1867 stipulated that the fortifications of the city of Luxemburg should be demolished. The same treaty provided that, for the protection of the Swiss canton of Basle, the Alsatian town of Huningen should never be fortified; and this servitude passed with the territory when Alsace was transferred to Germany in 1871. Numerous servitudes were imposed upon the Balkan states by the Treaty of Berlin in 1878.[4] By the Treaty of Portsmouth in 1905 Russia and Japan obligated themselves not to construct upon their respective possessions on the island of Sakhalin or the adjacent islands any fortifications or other similar military works. A recent instance is the undertaking confirmed in 1922 by Finland, as successor to the obligations of Russia, not to fortify the Aaland Islands.[5]

Of exceptional importance are the negative servitudes imposed upon Germany by the Treaty of Versailles in 1919. Article 180 of the treaty requires that "all fortified works, fortresses and field works, situated in German territory to the west of a line drawn fifty kilometers to the east of the Rhine, shall be disarmed and dismantled." The construction of new fortifications of whatever kind is forbidden in the above zone.[6]

[1] This servitude was extinguished by the Treaty of Versailles of 1783.

[2] These servitudes were subsequently set aside by Belgium with the acquiescence of the interested parties.

[3] See below, p. 347. [4] See above, p. 90. [5] See above, p. 88.

[6] In addition to these provisions were numerous others restricting Germany in respect to the size of her army and navy, her facilities for the manufacture of arms and ammunition, and other phases of military activity. But these latter were more properly restrictions upon the independence of the government than

CHAP. XVI

Similar in character were the servitudes imposed upon Turkey, Greece and Bulgaria by the Convention respecting the Thracian Frontier signed at Lausanne on July 24, 1923, in accordance with which the territories on both sides of the frontiers separating Turkey from Bulgaria and from Greece were to be demilitarized to a depth of about thirty kilometers.[1]

The Monroe Doctrine

An unusual form of negative servitude, of a political rather than a legal character, is that imposed by the United States upon the smaller states of the American continent in pursuance of the Monroe Doctrine. The United States considers it dangerous to its peace and safety that any of these states should, even by voluntary act, cede a portion of their territory to a European or Asiatic power or permit such power to obtain political control over it.[2] But the prohibition thus laid down is enforced, not against the states whose territory is involved, but against the non-American state seeking a foothold upon the continent. In 1912 a report that a Japanese firm was about to purchase Magdalena Bay, on the coast of Lower California, as a naval base or for the establishment of a Japanese colony, caused the adoption by the United States Senate of a resolution forbidding, in the language of diplomacy, "the possession of such harbour or other place by any corporation or association which has such relations to another government not American as to give to that government practical power of control for military or naval purposes."[3] This general attitude on the part of the United States has in several instances been confirmed by specific treaty agreement. By the treaty of 1903, recognizing the independence of Cuba, the United States required the new state to pledge itself never to enter into any treaty with any foreign power which would impair its independence or in any manner authorize the foreign power to obtain lodgment in or control over any portion of the island by coloniza-

upon the territory itself, and created on the part of other states rights *in personam* rather than rights *in rem*.

[1] For the text of the convention, see *Am. Journal*, XVIII (1924), Supp., 62. Compare further the provisions of Article 4 of the Straits Convention providing for the demilitarization of the territories adjoining the Straits.

[2] See above, pp. 147 ff.

[3] Senate Resolution, August 2, 1912, *Cong. Record*, Vol. 48, Part 10, 10045-10046. It should be observed that Senator Lodge, in speaking to the resolution, disclaimed its immediate dependence upon the Monroe Doctrine and declared that it rested upon a principle "older than the Monroe Doctrine," namely, the right of self-protection. *Ibid.* But in so far as the Monroe Doctrine itself is based upon the right of self-protection (see above, p. 147), the Magdalena Bay incident has been generally referred to as among the later manifestations of the Doctrine.

tion or for military or naval purposes.[1] The treaty of 1903 with Panama gives the United States a monopoly in perpetuity for the construction of a canal across the territory of that state;[2] and by a treaty with Nicaragua in 1914[3] the United States secured the exclusive proprietary rights necessary for the construction of an interoceanic canal across Nicaraguan territory.

[1] Malloy, *Treaties*, I, 362.
[2] *Ibid.*, II, 1349.
[3] 39 *Stat. at Large*, 1661. *Am. Journal*, X (1916), Supp., 258.

CHAPTER XVII

JURISDICTION OVER THE AIR ABOVE NATIONAL TERRITORY

a. The formulation of a law of aërial space

At the beginning of the twentieth century states were presented with the problem of regulating the transmission of messages by wireless telegraphy and the navigation of the air spaces above their territory by balloons and aëroplanes. There being no law on the subject, jurists led the way in an attempt to formulate the principles of aërial jurisdiction by resorting to the analogies of the jurisdiction of states over land and territorial waters. But in so doing the widest diversity of view was manifested. Some urged that the air spaces not only over the high seas but over the land territory were free to all, subject, however, to such measures as the individual state might be obliged to take in self-preservation. Such was the view expressed by the Institute of International Law at its meeting at Ghent in 1906, when a series of articles was drawn up for the International Regulation of Wireless Telegraphy.[1] Other jurists argued that the air space over the territory of a state should be regarded as subject to the jurisdiction of the state in the same way as the marginal sea along its coast, giving to the state a primary right of control, but allowing innocent passage for the messages and aircraft of other states. In addition to these opposing, but moderate, views were others asserting on the one hand complete freedom of the air and on the other hand complete sovereignty without any restriction.[2] To this problem of jurisdiction over the air was added the less difficult task of providing administrative regulations for the transmission of wireless messages at sea from the vessels of one nation to those of another, and from vessels at sea to stations on the shore; as well as regulations for the navigation of the air spaces both over the high seas and over the land, in the interest of the navigators themselves and of the population beneath them.

b. Jurisdiction over wireless messages

In respect to the transmission of wireless messages to or from points without the state, the question of the jurisdiction of the

[1] *Resolutions,* 164. See also articles adopted in 1910, *ibid.,* 171.

[2] For a summary of the opposing views of publicists, see Hazletine, *Law of the Air,* Lect. I.

state has been subordinate to the question of administrative regulation. Whatever claim of jurisdiction might be advanced by the state, it has been clear that no actual control could be exercised by the individual state over such messages except in so far as they might be received at stations on the shore or inland, and here the control was based upon territorial sovereignty and could be exercised without question. While, therefore, the respective claims of jurisdiction of the several states continue at variance, the more practical issue of the administrative regulation of foreign wireless messages has been largely met by the adoption of two general international conventions, to each of which the United States has been a party.

Administrative regulation of messages

In 1906 an International Wireless Telegraph Convention [1] was signed at Berlin, in which the signatory powers made provision for the reciprocal exchange of wireless telegrams by their coastal stations and stations on shipboard without distinction of the particular wireless system adopted by such stations. Coast stations were obligated to give absolute priority to calls of distress from ships, and to answer such calls with similar priority, and to take such other action as might be required. Provision was made for the connection of the coastal stations with the telegraph system by special wires, so as to facilitate the forwarding of messages. A supplementary agreement made provision for a similar reciprocal exchange between ships at sea which possessed wireless installations.[2] The convention of 1906 was superseded by the International Wireless Convention signed in London, July 5, 1912, by the representatives of forty-three governments,[3] to which was annexed a series of "service regulations" dealing with the organization of radio stations, and the conditions and methods of transmitting messages. A significant feature of this convention is the fact that it was signed not merely by the states parties to it, but separately by their colonies and protectorates; and that in the conferences for which provision was made these "contracting countries" were to be represented by separate delegates each entitled to one vote.[4]

c. Law aërial navigation

As in the case of wireless telegraphy, the question of the right of a state to regulate the passage of aircraft through the air space over its territories did not become sufficiently acute before 1914 to lead to the formulation of definite rules. Resolutions embodying a constructive program of legislation, submitted by its committee

[1] Charles, *Treaties*, 151. [2] *Ibid.*, 158. [3] *Ibid.*, 183.
[4] See Art. XII. No one state, however, was to have more than six votes.

CHAP. XVII

on aviation, were adopted by the International Law Association at its meeting in Madrid in 1913,[1] but no action was taken by national governments. Upon the outbreak of the war belligerent states immediately asserted full jurisdiction over the air above their territory as a measure of national defense. At the same time, neutral states, solicitous not to be wanting in fulfilment of the obligations of neutrality, refused to belligerent airships a right of passage across their territories, thus making the use of the air space conform to that of the land itself rather than to that of the marginal sea or international straits.[2] The Dutch and Swiss Governments were particularly alert to prevent the passage of Allied and German planes across their territories. By the close of the war the jurisdiction of a state over the air space above its territory appeared to be settled, but the question of a right of innocent passage for the ships of other states still awaited agreement.

The Aërial Navigation Convention of 1919

On October 13, 1919, an Aërial Navigation or International Flying Convention was signed at Paris bringing the whole subject under international statutory law.[3] The convention, however, deals only with times of peace, and does not restrict in any way the right of belligerents or of neutrals to assume full control over their air spaces for purposes of national defense in time of war. The primary question of jurisdiction is settled by the recognition that "every Power has complete and exclusive sovereignty over the air space above its territory," including adjacent territorial waters.[4] But at the same time each state undertakes in time of peace to accord freedom of innocent passage above its territory and territorial waters to the aircraft of the contracting states without distinction of nationality, provided the conditions established in the convention are observed.[5] Special provisions are laid down with respect to the courses to be followed when such freedom of passage is resorted to.[6] The nationality of aircraft is to be determined according to their ownership and registration, registration being

[1] *Proceedings*, Twenty-eighth Conference, 222-245.

[2] A suggestive contrast is presented between the use of the Panama Canal by belligerent men-of-war and the denial of the use of the air spaces over the canal to belligerent airships. The proclamation of the President relative to the neutrality of the Canal Zone, November 13, 1914, Rule 15, prescribed that "Air craft of a belligerent Power, public or private, are forbidden to descend or arise within the jurisdiction of the United States at the Canal Zone, or to pass through the air spaces above the lands and waters within said jurisdiction." *Am. White Book, Europ. War*, II, 18.

[3] The convention was signed by twenty-seven states, including the United States, Great Britain, France, Italy and Japan. For the text see *Am. Journal*, XVII (1923), Supp., 195.

[4] Art. 1. [5] Art. 2. [6] Art. 3, 4, 15.

restricted to nationals of the state or to incorporated national companies.[1] In order to secure observance of the conditions of navigation, only aircraft of the contracting states are to be permitted freedom of innocent passage; and as an additional means of protecting the safety of aërial navigation a technical minimum standard of competence of officers and crew is provided for in an annex, further requirements being left to the individual states.[2]

Commission for Air Navigation

The convention further makes provision for the creation of a permanent International Commission for Air Navigation, organized so as to secure preponderant voting power to the five Great Powers as against all contracting states, and placed under the direction of the League of Nations.[3] The commission is empowered to receive and act upon proposals for amending the convention or any of its annexes, and it will collect information with respect to air navigation and publish official maps and prepare opinions. Disagreements relating to the interpretation of the convention are to be referred to the Permanent Court of International Justice, but the commission itself is given authority to decide by a majority vote disputes concerning the technical regulations.[4] A special difficulty foreseen by the convention is the prevention of customs fraud. Provision is made that aircraft must depart only from and alight only in specially designated "customs aërodromes," and frontiers must be crossed at points indicated on aëronautical maps.[5] There is to be examination of the aircraft's papers after the manner

[1] Art. 5-10.

[2] Art. 11-14. An earlier draft of the convention, elaborated during the Paris Conference of 1919, applied to airships the rules governing jurisdiction over merchant vessels in territorial waters. Provision was made (Art. 23) that "the legal relations entered into between persons on board an airship in flight are governed by the law of the nationality of the aircraft," an exception being made in the case of offenses committed against a national of the territorial sovereign when the offense was followed by a landing upon the territory. See A. K. Kuhn, "International Aërial Navigation and the Peace Conference," *Am. Journal*, XIV (1920), 369.

[3] Art. 34.

[4] Art. 37. Attention may be called to the unique method of representation of the member states in the new union. The five leading powers are to have each two representatives; other states, including the British self-governing dominions, each one representative. Votes are to be cast by states, but the votes of the five leading powers are overweighted, so as to give them as a whole a majority of one over the total number of votes of the other contracting parties. See Art. 34.

[5] Annex H. Mr. Kuhn calls attention to the need of legislation by Congress for the regulation of aërial navigation in the United States. As in the case of maritime navigation, there is obvious need of a single municipal code prescribing uniform rules for the whole country. Such a municipal code would doubtless, as in the case of maritime laws (see below, p. 294), follow closely the rules of the international convention. *Am. Journal*, loc cit.

CHAP. XVII

of the examination of a marine vessel's papers in port. For reasons not stated, the right of adherence to the convention is somewhat limited, being confined to members of the League of Nations or other states admitted by a three-fourths majority vote.

CHAPTER XVIII

THE HIGH SEAS

a. The high seas open to the use of all nations

Outside the territorial waters of the several states, as circumscribed by the maritime belt following the sinuosities of the coast, lie the high seas. These bodies of water, embracing the several oceans, the arms or branches of those oceans, such as the Mediterranean, the North, the Baltic, the Caribbean, and the Black seas, bays and gulfs too wide at their mouth to be territorial, such as the bays of Biscay and Bengal, connecting seas, such as the Sea of Marmora and the Red Sea, are open to all nations alike for purposes of navigation, of deep-sea fishing, or of submarine cable communication. Upon the high seas no state may claim rights of jurisdiction other than over ships flying its national flag; and on these the basis of control is personal rather than territorial.

Early claims to exclusive jurisdiction

The principle that the high seas are open and free to the use of all nations was not recognized in its full extent until the first quarter of the nineteenth century. The early Roman jurists looked upon the sea, as upon the air, as common to all mankind. But with the development of commerce in the later Middle Ages, maritime states began to claim dominion over parts of the open sea adjacent to their territories. The Adriatic Sea was claimed by Venice, and the Ligurian Sea by Genoa. The Baltic Sea was shared by Sweden and Denmark. England not only claimed sovereignty over the Narrow Seas and the North Sea, but staked out the Atlantic Ocean itself by a line drawn from Cape Finisterre in Spain around the British Isles to Stadland in Norway. These claims reached the height of their extravagance when Portugal and Spain, in dispute as to the extent of their territorial possessions in the Atlantic and the Pacific, entered into the treaty of Tordesillas in 1494, delimiting their boundaries of discovery in the New World by a line drawn three hundred and seventy leagues west of the Cape Verde Islands, Spain receiving the lands west of the line and Portugal those to the east.[1] Thereupon Portugal claimed sovereignty over the Indian Ocean and the south Atlantic, and Spain

[1] See above, p. 222.

CHAP. XVIII

over the Pacific and the Gulf of Mexico. Some of these claims to exclusive jurisdiction were acquiesced in by other powers. England succeeded, by the power of its navy, in compelling foreign fishing-vessels to take out a license to fish in the North Sea;[1] while foreign vessels entering the waters claimed by England as territorial were obliged to strike their topsail and take in their flag in recognition of her sovereign jurisdiction. On the other hand, the excessive pretentions of Spain and Portugal were stoutly resisted by England, as illustrated in the famous statement of Queen Elizabeth, who, untroubled by the inconsistency of English claims, informed the Spanish ambassador that "the use of the sea and air is common to all; neither can a title to the ocean belong to any people or private persons, forasmuch as neither nature nor public use and custom permitteth any possession thereof."[2] On the whole but little law was recognized in the matter. Each state asserted such claims as seemed warranted in its own eyes and obtained recognition of them in proportion to its power to defend them.

Conflicting doctrines of writers

Naturally the conflicting claims of states gave rise to a corresponding doctrinal controversy. To Grotius belongs the distinction of making the first effective plea for a larger freedom of the seas. His pamphlet, *Mare Liberum*,[3] appeared in 1609, in defense of the right of the Dutch to navigate the Indian Ocean, claimed by Portugal to be its exclusive territorial waters. His argument was based upon *a priori* principles derived from the Roman law, that the sea could not in fact be "occupied" as in the case of land, and therefore must have been intended by nature to be free to all. Moreover, the sea, being inexhaustible in use, was not in principle susceptible of occupation, which was necessary in the case of things the utility of which could only be conserved by becoming private property. These arguments are somewhat qualified in the *De Jure Belli et Pacis*[4] of 1625.

Grotius was answered by a number of advocates of territorial claims. Notes of Gentilis in defense of Spanish claims were published posthumously in 1613, under the title *Hispanicæ Advocationis Libri Duo.* John Selden replied in 1618 with his *Mare Clausum,* controverting theories of natural law with the bald fact that parts of the sea had actually been appropriated by England.

[1] See Hall, *International Law,* § 40.
[2] *Ibid.*
[3] Eng. trans. by R. Van D. Magoffin, 1916.
[4] Bk. II, Chap. III, §§ VIII-XIV.

In 1653 Sir John Burroughs published a further defense of British claims under the title, *The Sovereignty of the British Seas,* while Paolo Sarpi defended the claims of Venice in a volume published in 1676.[1] For the time being Grotius appeared to be in the minority; but by the eighteenth century new writers came to his support, notably Bynkershoek, whose work, *De Dominio Maris,* was published in 1702.[2] Bynkershoek recognized, however, the fact that the seas could be effectively occupied to the extent of the maritime belt measured by the range of a cannon-shot.[3] Vattel repeated in 1758 [4] the *a priori* arguments of Grotius, and his principles found a ready hearing among the writers of the early nineteenth century.

Modern practice of states

Side by side with the change of doctrine came a change of practice. The right of free navigation won general acceptance by the close of the seventeenth century, but it continued for more than a century to be attended by the necessity of saluting the British flag when vessels entered the waters regarded by that government as the "British Seas." But this last survival was tacitly abandoned after its vigorous reassertion in 1805.[5] Fishing rights came later, Denmark abandoning its claims to the regions of Greenland and Iceland, and Great Britain abandoning its claims to the German Ocean. A last attempt on the part of Russia in 1821 to assert a claim to the exclusive sovereignty of Bering Sea by prohibiting foreign ships from approaching within one hundred Italian miles of the shores of Alaska was resisted by the United States and other powers, and was promptly abandoned by conventions concluded in 1824 and 1825.[6] At the present day, whether the law rests upon a principle of "natural rights" more or less obsolete, or whether it rests upon a new theory based upon the obvious needs of the community of nations, general practice recognizes the high seas as open and free to the use of all nations beyond the strict limits of the marine league surrounding the several maritime states. This freedom is protected, rather than restricted, by the necessary regulations that have been adopted for the protection of navigation and fishing and for the suppression of piracy

[1] For details of these treatises, see Fulton, *Sovereignty of the Sea.*
[2] Eng. trans. by R. Van D. Magoffin. *Classics of International Law.*
[3] See above, p. 250, n. 3.
[4] *Droit des Gens* (Eng. trans.), Bk. I, §§ 279 ff.
[5] See Hall, *International Law,* § 40.
[6] For the reappearance of this claim on the part of the United States as successor to Russia, see below, p. 296.

CHAP. XVIII

and the slave trade.[1] On the other hand, it is still subject to sharp restrictions in time of war, when precedence is given in several matters to belligerent rights over the normal rights of states not parties to the war.[2]

b. The law of the sea

The law of the sea in respect to the protection of navigation has already been discussed in part in connection with the jurisdiction of states over vessels flying the national flag. Order is maintained on the high seas as between individuals by subjecting the internal discipline of each vessel to the law of the state whose flag it flies, irrespective of the nationality of the parties involved in the case.[3] Each state determines for itself the conditions under which it will admit merchant vessels to its registry; and once a vessel is authorized to fly the flag of a particular state, no other state may question its right to sail the seas or interfere in any way with its movements.[4] On the other hand, the maintenance of order on the high seas as between national vessels is secured by general regulations to prevent collisions, and by special regulations governing fishing-vessels in parts of the sea where the need of such regulations has been felt.[5]

Regulations to prevent collisions

While no single code of navigation for the prevention of collisions has yet been adopted, the urgent need of common action in this matter has led the individual maritime states to adopt identical municipal regulations with respect to lights and signals, the law of the road, piloting, and courses. Great Britain led the way with a "Commercial Code of Signals for the Use of All Nations" published in 1857, which was subsequently adopted by all maritime states. In 1888 the Institute of International Law drew up a "Draft of Uniform Law for Marine Collisions,"[6] and this was followed in 1889 by another draft convention prepared by a maritime conference of the leading states assembled at Washington. Action by the separate states was, however, delayed, and a new conference met at Brussels in 1909. The draft conventions prepared by this last body dealt with limitations upon the liability of ship-owners, maritime mortgages and privileged liens, and reparation for injuries resulting from collisions.[7] They were indorsed the following year and recommended to the several states for separate adoption as national law. While there is no single conventional rule, the uniform provisions of national law, together

[1] See above, pp. 204 ff. [2] See below, Chap. XXXII. [3] See above, p. 190.
[4] See above, p. 190. [5] See below, pp. 294-295. [6] *Resolutions*, 83.
[7] The text of the conventions may be found in *Am. Journal*, Supplement, IV (1910), 115.

with established usages, are regarded by national courts as a sort of common law of the sea to be applied in cases properly coming before them.[1]

c. Regulation of fishing on the high seas

While there has been in general no need for the regulation of fisheries on the high seas, special cases have arisen where joint action was called for by the states interested in protecting the fisheries and the fishing-vessels in a particular part of the sea adjacent to their coasts. One of the first and most important conventions adopted with this object in view was the Hague Convention of 1882 for the Regulation of the Police of the Fisheries in the North Sea outside Territorial Waters. This agreement made provision for the registration of fishing-vessels and for a special emblem to be borne by them, while specific rules were laid down for the avoidance of conflicts between vessels of different nationalities. An exceptional provision, of great collateral importance, is the authorization of the cruisers of the signatory powers to exercise a reciprocal right of visit, search, and seizure of the vessels of their several flags for the enforcement of the rules laid down.[2] A second general convention adopted in 1887 was directed towards the abolition of the liquor traffic among fishermen in the North Sea.[3] In 1901 Great Britain and Denmark concluded an agreement for the regulation of fisheries in the waters adjacent to the Faröe Islands and to Iceland, similar in character to the North Sea agreement of 1882.[4]

The Bering Sea Seal Fisheries case

The controversy between the United States and Great Britain over the seal fisheries in the waters adjacent to Bering Sea was perhaps too exceptional in respect to the issues raised to form a precedent of importance. The outcome of the resort to arbitration shows, however, the possibilities of international regulation of an industry at once domestic and international. In 1886 and 1887 United States police cruisers seized certain British Columbian vessels for violation of regulations made by the United States for the protection of the seal fisheries. The seizures were upheld by the United States courts, which relied upon the theory that the waters of Bering Sea were a closed territorial sea.[5] The dispute was

[1] The question of the jurisdiction taken by national courts in cases of collision is discussed above, p. 197. See in particular the case of the *Scotia*, 14 Wallace, 170 (1871), where the universal obligation of established maritime usages is emphasized.

[2] Oppenheim, *International Law*, I, § 282.

[3] *Ibid.*, § 283.

[4] *Ibid.*, § 285.

[5] Moore, *Digest*, I, § 172.

CHAP. XVIII

submitted to arbitration by a treaty of 1892, which called upon the arbitrators not only to render an award on the merits of the case, but to frame regulations which might be concurrently adopted for the protection of the seals.[1] In presenting its case the United States, while not claiming exclusive jurisdiction over Bering Sea, relied upon rights inherited from Russia, by which jurisdiction might be exercised to the extent of protecting the seals when absent from their breeding-places on American territory in search of food on the high seas. This claim of a property right in the seals, which might be protected in the open sea as well as on the Pribyloff Islands themselves, was rejected by the arbitration tribunal.[2] The tribunal, however, drew up a series of regulations for the protection of the seals, to be adopted by the parties to the case and such other maritime powers as might agree to them. The failure of this effort to protect the seals from threatened extinction led the United States to call, in 1911, the Pelagic Sealing Conference, which met in Washington and drew up a convention providing for a closed season and other supplementary measures.[3]

d. Regulation of submarine cables

While the terminal points of submarine cables rest upon the territory of a particular state, and are therefore subject to its immediate control, the greater part of their length rests upon an ocean bed open for the use of all who desire to lay such lines of communication. Hence there arose the need for joint action on the part of interested powers, both to regulate the placing of cables and to prevent injury to them on the part of irresponsible individuals. In 1884 a conference of twenty-six states met at Paris and adopted an International Convention for the Protection of Submarine Telegraph Cables.[4] The importance of this convention lies not merely in the fact that it provides for the administrative regulation of what might be called an "international public utility;" but in the fact that the signatory powers undertook to punish the negligent breaking or damaging of a cable by the prosecution of offenders in their national courts, and in order to facilitate such protective measures agreed to permit their men-of-war to stop and verify the nationality of merchantmen of all nations which were suspected of having infringed the regulations of the treaty.[5]

[1] For the text of the convention, see *Am. Journal*, VI (1912), Supp. 72; Malloy, *Treaties*, I, 746.

[2] Moore, *Arbitrations*, I, Chap. XVII; *Am. Journal*, VI (1912), 233.

[3] Charles, *Treaties*, 60. For the act of Congress of 1912, see *Am. Journal*, VII (1913), 140.

[4] For the text of the convention, see Malloy, *Treaties*, II, 1949.

[5] See Oppenheim, *International Law*, I, §§ 286-7.

e. Freedom of the seas: in time of war

By long custom international law has come to recognize sharp restrictions upon the normal freedom of the seas in the event of war between two maritime states. Neutral states, not parties to the conflict, have been called upon to submit to the visit and search of their merchant vessels by the public vessels of the belligerent states, with the object of ascertaining the nationality of the vessel and the character and destination of its cargo.[1] Moreover, the right of belligerents to engage in battle on the high seas may seriously inconvenience neutral vessels whose course leads them through those waters. At the same time belligerents have exercised an authority to extend the area of maritime jurisdiction by marking off zones of offense and defense, in some cases planted with mines, into which neutrals enter at their own risk.[2] Neutral states are thus obliged to subordinate their normal rights upon the high seas to the prosecution of a war in the making of which they have had no part, and with which, furthermore, they have had no legal right to interfere notwithstanding the consequences to themselves. As for the belligerents, they obviously sacrifice the enjoyment of their rights of navigation, fishing, and communication in so far as either can succeed in doing injury to the other. The entire merchant marine of both states, although privately owned by individual non-combatant citizens, is by the law of maritime war subject to capture and confiscation by the enemy.[3]

Freedom of the seas: political aspects

A new aspect of the freedom of the seas came to the front during the World War. Both combatant groups, confronted with new conditions, found it necessary to stretch the rules of maritime warfare beyond the accepted interpretations of the past. As a neutral the United States suffered both from the application of the law of contraband and blockade by one belligerent and from the ruthless offensive measures of the other belligerent. American commerce, even that carried on with the neutral nations of Europe, was for the time completely demoralized. At the same time, Great Britain, although having fought scarcely a single sea battle, had captured or driven to cover the entire merchant marine of the enemy. It was under these circumstances that President Wilson made his address before the Senate on January 22, 1917, laying

[1] See below, p. 511.

[2] See below, p. 500.

[3] The specific questions raised by the conflicting rights of belligerents and neutrals are considered in detail below. They are referred to here only as indicating the practical limitations of the general principle of the "freedom of the seas."

CHAP. XVIII

down the conditions under which he considered it possible that the United States might coöperate with other nations in establishing an international authority to guarantee peace, and stating that "the freedom of the seas is the *sine qua non* of peace, equality, and coöperation."[1] Again in his inaugural address of March 5, the President enumerated among "the principles of a liberated mankind" which the United States would stand for, whether in war or in peace, "that the seas should be equally free and safe for the use of all peoples, under rules set up by common agreement and consent, and that so far as practicable they should be accessible to all upon equal terms."[2] This plea for a new freedom of the seas thereafter played a prominent part in the discussions in America and in Europe of the constructive basis of international peace. The second of the "fourteen points" repeats the principle in the form of "absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants.[3]

Freedom of the seas: as affected by naval armaments

It is difficult to assign a precise meaning to the phrase "freedom of the seas" as currently used by publicists in 1917-18. In time of peace, as has been shown above, the seas have long been free, so that any change in the law in that respect would seem to be uncalled for. Nor is it to be believed that all the proponents of the doctrine thought that in a future war belligerents, if including the more powerful nations, would be willing to forego the right to capture contraband and maintain blockade, whatever hardships those practices might inflict upon neutrals.[4] Assuming, however, that the freedom of the seas was contemplated as a constructive condition of a more durable international peace, it may be interpreted as meaning, in the first place, that all states must henceforth play a

[1] *Official Statements of War Aims and Peace Proposals*, 53.

[2] With these statements must be associated the frequent mention of the "freedom of the seas" in unofficial German discussions of the terms of peace, and in particular the address of von Bethmann-Hollweg before the Reichstag on November 9, 1916, in which, after pledging Germany's coöperation in peaceful arrangements to prevent war, the chancellor said: "Then the principles of justice and free development, not only on the Continent but also on the seas, must be made valid."

[3] While the principles of the "fourteen points," together with other associated declarations of President Wilson, were incorporated into the terms of the armistice of November 11, 1918, it should be noted that the Allied powers, in their note of November 5, 1918, reserved a right to further interpretation of the second point above quoted.

[4] President Wilson was apparently of that opinion, and he and others seem to have thought it possible to call upon belligerents to abandon the right to capture the private property of the enemy. See below, p. 505.

part in maintaining international peace as a means of preventing the inevitable injury to themselves as neutrals in the event of a war between two irresponsible belligerents. In the second place, it is necessary to remove from the law of war all those elements which operate as a menace in time of peace. Obviously under the existing rules of maritime war the right to capture the merchant fleet of the enemy operates even in time of peace as a club in the hands of the nation whose navy is larger, and which may thereby obtain its will by intimidation without resorting to actual force. Practically speaking, the seas are not free to a state which must count on the loss of its merchant fleet as a condition of war, irrespective of the justice or injustice of its cause. The removal of this menace in time of peace could be accomplished, not by acquiescing in war and then denying to a belligerent the exercise of his customary rights, but by outlawing war and then by concerted action maintaining the freedom of the seas normally enjoyed in time of peace.[1]

[1] In this light may be read President Wilson's statement on January 22, 1917, that "no doubt a somewhat radical reconstruction of many of the rules of international practice hitherto thought to be established may be necessary in order to make the seas indeed free and common in practically all circumstances for the use of mankind"; and again, that the freedom of the seas was "a problem closely connected with the limitation of naval armaments and the coöperation of the navies of the world in keeping the seas at once free and safe." *Official Statements*, loc. cit. The writer's conclusions are confirmed in Potter, *Freedom of the Seas in History, Law, and Politics*, Chap. XII, which appeared while the present volume was in press. See, in particular, pp. 242-247, where the relation of the freedom of the seas to the general problem of international organization is discussed.

CHAPTER XIX

THE EXTERNAL INDEPENDENCE OF STATES

a. Freedom in respect to foreign relations

In the preceding chapters the *internal* independence of the state has been presented, both from the point of view of the jurisdiction or control of the state over the persons subject to its authority, and from the point of view of the property rights which a state possesses over the territory to which it has title. International law is, however, further concerned with the *external* aspect of independence, which is expressed in the freedom of the state in respect to its activities outside the boundaries of its national domain.

Apart from the rights associated with the management of its domestic affairs, whether concerning persons or territory, a state is recognized as being in law a free agent in the maintenance of relations with other states.[1] As such, it may enter into a wide variety of formal and informal contractual agreements with other states. The objects contemplated by these agreements have only in small part been brought within the field of international law. For the most part states have pursued their foreign policies without reference to, or control by, the interests of the international community as a whole.[2] The primary concern of international law has been simply to determine the capacity of the state to enter into contractual relations with other states which shall be regarded by the international community as legally binding upon the parties competent so to contract.

Limitations imposed by unequal treaties

The question of the legal capacity of a state to contract is, as has been seen, one of the decisive points in the determination of the possession by a political community of full international personality.[3] Any restriction imposed upon a state by another state or group of states in respect to the free determination of its foreign

[1] How far this legal freedom corresponds to an actual freedom is a question beyond the scope of international law. Even in municipal law a legal freedom of contract may have to be exercised under conditions which amount to practical compulsion. A corresponding physical necessity may dictate the action of states without encroaching upon formal independence.

[2] See below, pp. 302 ff.

[3] See above, p. 86.

relations raises a presumption against the formal sovereignty of the state. It is important to observe, however, that restrictions or limitations upon freedom of external action may be imposed upon a state without qualifying its legal status within the international community, provided they take the outward form of a free contract between the parties. Consequently when a stronger power or group of powers has not desired to deprive of membership in the international community the party that is being subjected to restrictions, the formality has been observed of concluding a treaty between the two parties, which preserves at least the outward appearance of a voluntary bargain between free agents.[1] By the treaty of 1839, for example, Belgium obligated itself to observe toward all other states the neutrality imposed upon it by the powers which guaranteed to it that status. The restriction involved no impairment of the formal sovereignty of the state.[2] Again, the restrictions placed upon Cuba by the United States at the time of the emancipation of the island were incorporated into a formal treaty between the two states, with the result that Cuba was able to assume the position of a sovereign state in the international community. By the terms of the treaty Cuba is obligated not to enter into any treaty with a foreign power which would impair its independence or to permit a foreign power to obtain lodgment in or control over any portion of the island.[3] If in point of law the obligation, from the general terms in which it is framed, might seem to amount to a serious restriction upon Cuba's freedom, in point of fact it is reduced to insignificance by the improbability of a desire on the part of Cuba to take the action contemplated. In contrast with these two cases it may be noted that the London Convention of 1884[4] imposed upon the South African Republic the obligation not to conclude treaties with any other foreign state except the Orange Free State. This restriction was not regarded by the republic as barring its claim to be "a sovereign international state," although Great Britain subsequently asserted and enforced a contrary conclusion.[5]

Restrictions imposed by treaties of peace

Similar in their legal character to the restrictions imposed upon a weak state by one or more stronger states are the restrictions sometimes imposed upon a defeated state by the treaty of peace

[1] See above, p. 90.

[2] See above, p. 88.

[3] Art. 1, Malloy, *Treaties*, I, 362.

[4] Art. 4. *Br. and For. State Papers*, LXXV, 5.

[5] For the controversy with respect to the effect of the restriction in question upon the sovereignty of the South African Republic see Baty, *International Law in South Africa*, 47 ff.

CHAP. XIX

with which the war is concluded. These restrictions have been at times of a far-reaching character, but their legal effect is judged not by the extent to which they affect the actual independence of the state, but by the extent to which they encroach upon the state's formal sovereignty. Provided the latter be left intact, the obligations imposed upon the defeated state are, in the theory of the law, considered as conditions which it willingly pays as the price of peace.[1] By the Treaty of Versailles Germany was obligated to abrogate certain treaties, to continue others in force, and to conclude new treaties of a stipulated character.[2] None of these restrictions, however, affected the legal competence of Germany to contract with third states in a sense contrary to the obligations of the treaty. Apparently any such contracts would be legally valid as between the parties to them, although involving breach of contract by Germany with the parties to the Treaty of Versailles, and giving the latter the right to such redress as international law affords.

Effect of bilateral treaties

Apart from the exceptional cases in which the freedom of a state in the control over its foreign affairs is restricted by treaties of unilateral obligation, there is the large body of treaties in which the parties mutually restrict their freedom of action in respect to their relations with third states. The fact that in such cases the contracting parties stand on a parity and that the obligations undertaken may be set aside by dissolution of the treaty in accordance with its terms prevents the restrictions thus assumed from being regarded as in derogation of the legal capacity of the parties.[3] Thus the formation of a political alliance may restrict the right of the allies to enter into contractual obligations with third states contrary to the terms of the alliance. Again, states may enter into commercial treaties containing a "most-favored-nation" clause which will have the indirect effect of qualifying their bargaining power in concluding a trade agreement with third states. But no question is raised thereby with respect to their general legal competence. Agreements to the contrary would be legally valid, although giving rise to a claim for redress on the part of the injured state.

b. Objectives of foreign policy

International law assumes, therefore, a general right on the part of a state to maintain such relations with other states as shall

[1] See below, p. 327. [2] See Art. 282-295.

[3] The student may compare the corresponding provisions of municipal law, which, with the exception of contracts void as being against public policy, permit restrictions upon personal freedom of action in various fields of activity.

seem to it best to promote its national welfare. The actual relations thus maintained are, however, for the most part outside the scope of international law. While numerous restrictions have come to be imposed upon states in the administration of their domestic affairs, obligating them, for example, to accord a due measure of protection to aliens, and to extradite fugitive criminals, international law has thus far left the individual state practically unhampered in the pursuit of its foreign policies. In consequence, since international law has offered no adequate sanction for the protection of national rights, states have felt it their primary duty to themselves to shape their foreign policies so as to secure the fullest measure of protection for their national existence. This duty accomplished, states have, in more modern times, concentrated their attention upon the development of their commercial relations with other states, and have sought by one means or another to obtain for themselves the largest possible share of the material wealth of the world. The result has been that conflicts of national policies have come about, at times friendly, where the issues involved were not of importance, at other times sharp to the point of armed hostilities, where matters of vital concern were at stake. In the meantime the international community as a whole has attempted only in small degree to reduce these conflicts to law and order by undertaking a collective responsibility for the protection of national rights. The fundamental sovereignty of the state has been put forward by the stronger powers as an argument against the development of such a collective responsibility; while weaker states have found their best protection in avoiding the areas of conflict. In so far, therefore, as existing international law is concerned, the foreign policies of states, and the disputes to which they give rise, can practically be dismissed from attention. But since these same foreign policies are often entangled with the assertion of legal rights and have been, as a matter of fact, at the root of most of the wars of modern times, it is necessary to sketch their broad outlines and the conditions under which they are put into effect.

National self-protection

For nations as for individuals, self-preservation is the first and fundamental right.[1] A state recognized as a member of the inter-

[1] See above, p. 142. It will be remembered that in so far as international law is concerned it makes no difference in this respect whether the particular nation is a homogeneous group, such as should logically constitute a single state, or whether it is a heterogeneous group with no natural binding ties and held together chiefly by the power of a dominant part of the state.

CHAP. XIX

national community has the right to take all measures not directly unlawful to safeguard its national existence. In consequence, the aim of statesmen has been to strengthen the position of their state, on the one hand by forming alliances with friendly powers,[1] and on the other hand by isolating as far as possible the powers they fear and checking and impeding their development. The case of the United States is somewhat exceptional in this respect, since its geographical situation has been itself a formidable barrier against attack. Hence instead of seeking alliances with other states, it has been the policy of the United States to avoid all such entanglements. On the other hand, the United States has adopted a distinctive policy of its own, known as the Monroe Doctrine, in accordance with which notice has been served to European powers that they must not seek to "extend their system" of colonial control to any part of this hemisphere.[2] It is a question whether this doctrine as a general principle has been incorporated into international law;[3] but unquestionably the United States still acts upon its own initiative in the interpretation of the original doctrine and in its modification to meet new circumstances. Within more recent years the acquisition by the United States of insular possessions in the Pacific Ocean has made it necessary for it to come into accord with other nations having interests in that part of the world. Hence the Government was led to conclude the several treaties drawn up at the Washington Conference of 1921-22, looking, in this case, not to the maintenance of a balance of power, but to collective action in matters of common concern.[4]

Foreign policy of Great Britain

The foreign policy of Great Britain has developed along parallel, if somewhat different, lines. Here the problem has been the defense of a world empire built up by colonization and conquest and forming the essential condition of the prosperity of the industrial state which forms the center of the empire. The necessity, for example, of keeping open the trade routes to India dictated the adoption of special policies in respect to Russia and Turkey and led to the assertion of what might be called, by analogy with the Monroe Doctrine, the "Disraeli Doctrine," protecting the integrity of the Ottoman Empire as an offset to the control of

[1] See above, p. 147. [2] See above, p. 147. [3] See above, p. 148.

[4] See the "Treaty between the United States of America, the British Empire, France, and Japan, signed December 31, 1921, relating to their insular possessions and insular dominions in the Pacific Ocean." Also the Declaration accompanying the same, and the supplementary treaty of February 6, 1921. *Am. Journal*, Vol. XVI (1922), Supp. 60, 63.

southeastern Europe by Russia. Again, the power of the British navy has been the chief means of protecting the distant parts of the empire against attack; and this fact has in turn dictated the opposition of the British Government to any agreement with other states looking toward the abolition of the capture of private property on the high seas in time of war.[1] Further, the conquest and consolidation of the British possessions in Africa had its indirect effect upon the policies of the United Kingdom in respect to European questions.

As in the case of Great Britain, so in the case of France, Germany, Austria-Hungary, Russia, Italy, Japan, and other countries, national self-defense has been the determining factor in shaping the foreign policy of the state. The enforcement of this primary right, as interpreted by each state individually, has given rise to the chief diplomatic conflicts of modern times. Whether it be the policy of France in Morocco, or of Italy in Tripoli, or of Austria-Hungary in the Balkans, or of Japan in China, the imperative call of self-protection has dictated in some cases the formation of alliances and ententes, and in other cases a single-handed attitude of control by superior physical force. In each instance may be found the assertion of doctrines which, whether or not bearing the name of their prominent exponents, Delcassé, Sonnino, Tisza, Venizelos, or Ishii, have their analogy with the Monroe Doctrine of the United States, as being individual, and to some extent arbitrary, assertions of a position which the state is prepared to maintain at all costs.[2] From the point of view of international law the positions taken have been as permissible in the one case as in the other, since the whole field of such relations was until 1919, and in large part still is, outside the scope of the law.

[1] See below, pp. 505-506.

[2] "The objection of England in 1911 to the occupation of a naval station by Germany on the coast of Morocco; the objection of the European Powers generally to the vast force of Russia extending its territory to the Mediterranean; the revision of the Treaty of San Stefano by the Treaty of Berlin; the establishment of buffer states; the objection to the succession of a German prince to the throne of Spain; the many forms of the Eastern question; the centuries of struggle to preserve the balance of power in Europe; all depend upon the very same principle which underlies the Monroe Doctrine; that is to say, upon the right of every sovereign state to protect itself by preventing a condition of affairs in which it will be too late to protect itself." Senator Root, "The Real Monroe Doctrine," *Am. Journal*, VIII (1914), 427. Compare Secretary Hughes' statement in 1923: "They [the American states] have, of course, corresponding rights of self-defense, but the right is individual to each." *Ibid.*, XVII (1923), 611.

CHAP. XIX

The development of commerce

Subordinate to, but closely connected with, the protection of the national existence as an objective of foreign policy has been the strengthening of the material resources of the state by the development of commerce overseas. With the simultaneous rounding of the Cape of Good Hope and the discovery of the American continent, new fields of colonial expansion were opened up to the leading European states, and rivalries were begun which, under new forms, persist to the present day. The advantages sought from the possession of colonies have varied with the changing conditions of national life. In more modern times colonial possessions have been valuable chiefly as a source of raw materials essential to national manufactures, as a market for the disposal of the surplus products of industry, and as an opportunity for the investment of private capital upon advantageous terms. Each of these advantages has played its part at one time or another in determining the foreign policy of the leading industrial and commercial states. While the interests involved in them have been commercial in their nature, and have been in many instances of immediate concern to only a small part of the citizen body of the particular state, they have been the chief objective of foreign offices for the past half-century and have offered the principal field for the exercise of diplomatic strategy. In the resulting competitive struggle foreign offices have become the agents of domestic banking and commercial houses, and the normal rivalry between the citizens of different states has become a direct rivalry between governments. With this policy of colonial expansion and control must be associated the activities of governments in obtaining "spheres of influence" or "spheres of interest" in countries which they have been unable to bring directly under their sway.[1] These spheres of influence secure to the state possessing them a more or less exclusive monopoly of the economic exploitation of the area marked off, without, however, encroaching upon the formal sovereignty of the state which agrees to create them.

Competition for supplies of the raw materials of industry

The competition of the leading powers to obtain control over the sources of supply of the raw materials essential to their industrial life forms, perhaps, the most important phase of the commercial nationalism which in the later part of the nineteenth century replaced to a great extent the political nationalism of the preceding decades. The conversion of agricultural states, such as

[1] See above, p. 229.

Germany and Japan, into industrial states made it immediately imperative that their industrial life should be made as secure as their political existence. Older industrial countries, such as Great Britain, felt it necessary to anticipate the pressure of the new competition by obtaining a firmer hold upon their existing supplies. France, despoiled of part of its coal and iron ore after 1871, reached out for substitute supplies from the nearest available source. Italy, less favored by nature in respect to essential raw materials, was at a loss how to develop its industrial life upon which depended its ability to meet its increasing armament expenditures. The United States and Russia, alone of the Great Powers, could afford to face economic isolation without fear. Smaller industrial states, unable to bring diplomatic pressure to bear to secure special advantages, acquiesced with a greater or less degree of uneasiness in the necessity of living at the commercial mercy of their more formidable rivals.

The struggle for foreign markets

Second only to the problem of obtaining adequate supplies of raw materials was the problem of securing foreign markets for the disposal of the surplus products of industry. It is a characteristic of the modern industrial state that many of its particular products are manufactured in excess of domestic consumption. Hence it becomes the interest of the producer to build up centers of trade in all parts of the world which, when once established, become not only a source of profit to the capitalist but a means of industrial employment to a larger part of the population. The government of the state is then called upon, not only to give its protection to a vital condition of national prosperity, but to take all the means in its power to enlarge the available opportunities and to secure exclusive privileges for the trade of its own nationals. While the foreign office of the state is engaged in obtaining, by voluntary agreement or by diplomatic coercion, a political foothold in undeveloped countries, which may be made the basis of a monopoly of trade, the national legislature adjusts the tariff laws of the state so as to exclude as far as possible competitors from the home market and, where feasible, from the colonial market as well. By preferential tariffs enforced upon the dependent colony, or conceded voluntarily by the self-governing colony, states have succeeded in defeating the normal effect of competition and in securing to their domestic industries a development which they could not have obtained without state aid. At times national legislation has taken

CHAP. XIX

the form of rebates and subsidies, by means of which private producers have been able to overcome their rivals, while keeping up a show of competition on equal terms.

Opportunities for the investment of capital

A further international problem created by modern industrialism has been that of finding opportunities for the investment of the surplus capital which, like the excess of goods, has resulted from the mechanical inventions that have multiplied the productiveness of labor. It is here that the so-called "imperialism" of the Great Powers has exhibited its most striking manifestations. In many cases where the possession of a colony or the control of a protectorate or sphere of influence has not meant an exclusive control either of the raw materials or of the buying market, it has nevertheless meant that the opportunities for the investment of capital have been kept as a monopoly for the citizens of the state. Concessions for the building of railways and for the development of mines and oil-wells, and other valuable franchise rights have, as a general rule, been regarded as having a political and strategic as well as an economic character, and as therefore properly to be reserved for the exclusive exploitation of those owing allegiance to the state.[1] Attempts have been made in a number of instances to bring about the coöperation of capital of different countries in the development of particular areas; but these efforts have usually broken down under the pressure brought to bear upon the government in control of the area by the financial institutions and corporate enterprises controlled by its citizens.

c. Absence of a rule of law

The specific diplomatic conflicts to which the competition of the leading industrial powers in these different fields have given rise belong to the political history of the past half-century. International law has not been concerned with them, inasmuch as it was devoid of rules covering the issues involved. From time to time efforts were made to create a sort of international statutory law governing a particular situation; but such general treaties have represented too few states outside the circle of the rival powers to give permanence and stability to the agreement. In the case of Morocco, whose deposits of iron ore made its territory an object of diplomatic conflict in the opening years of the twentieth century, and whose public services offered an attractive field for the investment of foreign capital, an attempt was made by France and Great Britain in 1904 to dispose of the issue by an agreement under which

[1] See Brailsford, *A League of Nations*, pp. 278-282; *War of Steel and Gold*, Chap. II.

France was to have a free hand in Morocco in return for giving Great Britain a free hand in Egypt. The insistence of Germany upon a share in the disposal of Morocco's resources led to the calling of the Algeciras Conference of 1906, at which an attempt was made by a group of thirteen interested powers to settle the question upon the constructive basis of a guarantee of the formal independence and integrity of Morocco, accompanied by the principle of equal commercial facilities in Morocco for all nations.[1] Provision was made that none of the public services of the empire should be turned over to the profit of private interests.[2] In the absence of an adequate sanction, however, this collective agreement broke down, and war was narrowly averted in 1911 when the rival powers were again aligned against each other. Throughout the entire diplomatic conflict the issues were strictly "political," each nation being free to press such claims as it was able to justify to itself. Had arbitration been resorted to in 1911, it would have been impossible for any court, however desirable its mediation, to give a legal decision in the case. At best a compromise could have been effected, differing in no way in point of law from the diplomatic settlement actually reached.

Foreign policies toward China

The development of the resources of China led to a rivalry between the Great Powers which, after passing through various forms of divided control, has now been in part adjusted on the basis of a general agreement of the parties concerned. Having once been brought into commercial relations with the Western world, China offered not only a valuable market for manufactured goods, but a profitable field for the investment of capital in the development of railways and mines, and more recently, in respect to its neighbor Japan, a source of supply of raw materials. Individual powers sought and obtained leases of specified areas and larger spheres of influence in the outlying districts.[3] Treaties with individual powers fixed the maximum rates that might be imposed upon Chinese imports and provided that certain revenues should be pledged in payment of public debts incurred to foreign banking institutions.[4] Other treaties subjected state undertakings, railways, banks, and mines, to varying degrees of foreign control, and

[1] For the text of the General Act adopted by the Conference, see *Br. and For. State Papers,* XCIX, 141.

[2] Art. 105.

[3] Willoughby, *Foreign Rights and Interests in China,* passim. See above, p. 243.

[4] *Op. cit.,* Chap. XIX.

CHAP. XIX

limited the freedom of China in making further loans or granting industrial or commercial concessions.[1] As the result of these treaties China succeeded Morocco as a center of diplomatic conflict between the powers interested in the exploitation of its resources. The transfer of Germany's rights in Shantung to Japan in 1915 brought the problem of foreign control in China before the Peace Conference at Paris;[2] but no constructive rules representing the collective policy of the powers assembled at the conference were adopted.

Provisions of the Washington Conference

Finally the nine powers represented at the Washington Conference of 1921-22 succeeded in reaching a general agreement "relating to the principles and policies to be followed in matters concerning China."[3] In this treaty the signatory powers agree to respect the sovereignty, independence, and territorial and administrative integrity of China, and to use their influence to establish and maintain the principle of equal opportunity for the commerce and industry of all nations throughout Chinese territory.[4] With the object of making effective the principle of the "open door" in China, the contracting powers agree not to seek themselves, or to support their respective nationals in seeking, any arrangement which might establish in their favor superior rights with respect to commercial or economic development in any designated region of China, or any such monopoly or preference as would deprive the nationals of any other power of the right of undertaking any legitimate trade or industry in China.[5] The treaty is accompanied by a second treaty relating to the Chinese customs tariff, and by a series of resolutions touching subordinate questions of foreign administrative rights in China.[6] Considering the political influence of the contracting powers, it may fairly be said that their collective action in regard to the future status of China has become the basis of a potential rule of international law upon the subject, which will limit and restrict the freedom of action of each of the parties to the treaty in the determination of its policies toward China in the future. The authority of this agreement will doubtless be enhanced to the point of a definite rule of law should the powers not signatory to the treaty accept the invitation to be extended to them to

[1] *Ibid.*, appendix, tables. See also, G. A. Finch, "American Diplomacy and the Financing of China," *Am. Journal*, XVI (1922), 25.

[2] See above, p. 243.

[3] For the text of the treaty, see *Am. Journal*, XVI (1922), Supp., 64.

[4] Art. I.

[5] Art. II-V.

[6] For the texts of the treaty and the resolutions, see *ibid.*, 69, 76-83.

adhere to the treaty.[1] General adherence by the non-signatory states would convert the original treaty into a definite body of statutory legislation within the particular field.

Concessions in Mexico

The exploitation of the resources of Mexico by foreign capital has been accompanied by indirect rather than direct intervention of the governments whose subjects have invested in that country. During the long presidency of Porfirio Diaz concessions were freely granted to foreign capitalists for the development of mines and oil-wells and the building of railways. The terms upon which these concessions were obtained were, however, more favorable than the succeeding revolutionary Carranza Government believed to be compatible with the national interests of the country. In consequence the new constitution of 1917 was made to include provisions asserting an ultimate ownership of the nation in all lands and waters, including minerals, salt, mineral fuels, and petroleum in its different forms.[2] Foreign governments thereupon became concerned, in the interest of their citizens, to know whether the provisions of the constitution in this respect were to be retroactive.[3] Moreover, the imposition by the Mexican Government of new taxes upon the products of mines and oil-wells operated by foreign citizens under earlier concessions raised a question of diplomatic intervention by their governments in their behalf. Direct negotiations with the Mexican Government later became complicated with the recognition of a new *de facto* Government, of which Obregon became president on January 1, 1921. It was not until August 31, 1923, that the United States, having received satisfactory assurances that the property rights of its citizens would not be adversely affected by legislation under the new constitution, gave formal recognition to the government.[4] Throughout the diplomatic controversy, in which Great Britain became somewhat involved owing to the concessions held by its nationals in the oil regions, there was no rule of international law applicable to the case. Such diplomatic pressure as was put upon Mexico by withholding recognition of the

[1] See Art. VIII of the principal treaty.

[2] For the text of the Mexican Constitution of 1917, see *Annals, American Academy of Political and Social Science,* Supp., May, 1917.

[3] For a discussion of the normal property rights of aliens, see above, p. 178. The student of American constitutional law may make comparison with the provision of the Constitution, Art. I, Sec. 10, forbidding any State to pass a law "impairing the obligation of contracts," as well as with the provisions of the Fifth and Fourteenth Amendments requiring "due process of law," including just compensation, when persons are deprived of their property by the State.

[4] See above, p. 113.

CHAP. XIX

de facto government was the result of the individual decision of the particular powers concerned.

Cases of Persia and other undeveloped states

To these more conspicuous instances of the absence of any rule of international law regulating the foreign policies of states, where the objective has been the development of the commercial life of the nation, may be added the Anglo-Russian Agreement of 1907, by which two rival powers marked out for themselves spheres of influence in Persia which practically reduced that state, not itself a party to the agreement, to the status of a protectorate under dual, but divided, guardianship. Certain third states, not parties to the treaty, looked upon it with misgivings, but no successful effort was made to bring about a collective agreement of all or any large number of the powers, by which the status of Persia would have been put upon a legal basis. In the case of the forcible annexation of Tripoli by Italy in 1913 political as well as economic motives appear to have dictated the declaration of war against Turkey; but no question of collective action on the part of other powers was seriously raised, because possibly of the doubtful position of Italy as a member of the Triple Alliance. The single-handed control of Great Britain over Egypt, having succeeded to the previous dual control of Great Britain and France, remained practically uncontested by other powers down to the outbreak of the World War, when the protectorate was formally annexed to the British Empire.[1]

d. Tariffs and subsidies

With respect to legislation adopted by a state with the object of protecting and developing the foreign trade of its citizens, it should be noted that, while international law recognizes the right of every state to frame its domestic laws according to its own judgment of the national welfare, nevertheless such laws may at times directly affect the foreign relations of the state and give rise to protests and retaliatory measures on the part of other states. Preferential tariffs exacted of a colony or dependency in favor of the mother-country, or preferential tariffs conceded voluntarily by a self-governing colony to the mother-country, as in the relations between Canada and Great Britain, raise the issue of a violation of the spirit, if not the letter, of that equality of treatment which, in the form of "most-favored-nation" clauses, has come to be almost a principle of law in the commercial relations of nations. In like manner, tariff legislation which was practically prohibitive of certain foreign imports might be questioned by the state against which the prohibition was directed, although in this

[1] For the subsequent status of Egypt, see above, p. 97.

case the complete absence of any legal right in the premises would leave to the injured state no other redress than the adoption of measures equally injurious to the offender. The same is true of such forms of national legislation as subsidies and rebates, by which states have sometimes sought to obtain for their citizens a position in foreign markets which they could not win by the usual methods of commercial competition. States whose citizens suffer by the handicaps thus imposed upon them are free to adopt similar measures in aid of their own commerce, but beyond that they have no redress. International law at present offers no rule against unfair competition.

e. Merchant marine and foreign policy

The part played by the national merchant marine as a factor in international relations in time of peace has been conspicuous only within recent years. Two influences appear to be responsible. In the first place governments have for some time clearly perceived the intimate connection between a national merchant marine and an efficient navy. Ships of war, operating at a distance from their home base, must be supported by numerous auxiliary vessels, carrying provisions, ammunition, coal, and other supplies. If the transport of troops should be necessary, vessels other than men-of-war would be needed. In consequence, the larger maritime states have made it their policy to encourage the development of a national merchant marine, large enough to supplement the probable needs of the regular navy in time of war and under contractual obligation to submit to government control immediately upon the outbreak of war.

The second influence has been a purely commercial one. The overseas carrying-trade has been a profitable business for the citizens of a number of European states. At the same time it has assisted to a considerable degree in building up the foreign commercial markets of the home country. For both these reasons governments have found it desirable to encourage the growth of a merchant marine, and they have been willing at times to subsidize private ship-owners in order to assist them to overcome competition more effectively.[1] In its turn the development of a large

[1] The entrance of the United States, as owner of a large merchant fleet built during the World War, into competition with private owners of foreign vessels has raised questions similar to those presented by government subsidies to private owners. The ability of a government to sustain losses over a long period enables it to underbid competing lines less strongly financed. Compare, also, the provisions of the Jones Merchant Marine Act of 1920, by which preferential tariff treatment was granted to goods carried in American vessels. The fact that the execution of the act would have required the abrogation of some thirty-

CHAP. XIX

merchant marine has demanded of states the creation of a navy adequate to protect the ships from capture in time of war and able to keep open the trade routes which are the highways of traffic. This argument was frequently stressed in justification of the development of the German navy in the opening decade of the twentieth century, and it is, as has been seen, the political obstacle to the establishment of an actual freedom of the seas.[1]

f. The system of mandates

The tentative steps toward an international statute law [2] regulating the commercial relations of the great industrial states toward undeveloped territories, such as were taken by the Congo Convention of 1885, the Algeciras Convention of 1906, and the recent Washington Treaty of 1922 relating to China, dealt only with the specific cases in hand and did not lay down any general principles of law. The only suggestion of the recognition by states of such a general principle is to be seen in the provisions of the Covenant of the League of Nations with respect to the administration of territories placed under mandate.[3] The lowest group of these territories, known as Class C, are to be administered as integral portions of the territory of the mandatory, so that it would appear that they are to be governed by the commercial laws of the mandatory. In the case of the group of mandates known as Class B, and including the territories of central Africa, the rules provide not merely that the administration shall be in the interest of the native population, but that it shall also "secure equal opportunities for the trade and commerce of other members of the League." It is an open question how far this principle of the "open door" applies to the important mandates, including mandates over Palestine, Syria and Mesopotamia (Iraq), known as Class A mandates,[4] to which a provisional degree of self-government is to be granted by the mandatory state.

g. Difficulties attending the adjustment of national commercial policies

The problem of framing a constructive rule of law regulating the commercial relations of states has become an immediate and pressing one, now that it has come to be generally recognized how far the rivalry between the leading industrial powers for the con-

two existing commercial treaties led the President to refuse to enforce the specific provisions. See J. S. Reeves, "The Jones Act and the Denunciation of Treaties," *Am. Journal*, XV (1921), 33.

[1] See above, p. 299.

[2] Using the term in the restrictive sense applied to it above, p. 39.

[3] Art. 22.

[4] Compare the correspondence between Secretary Hughes and the British Foreign Office concerning the control of the oil resources of Mesopotamia, November, 1921.

trol of the world's markets was instrumental in determining the foreign policies that led directly or indirectly to the World War. Yet the difficulties that are met with at the very outset of the attempt to formulate such a rule make it doubtful whether it will be possible to secure any collective agreement of all, or of the leading, industrial states upon that subject in the near future. First, there is the fact that the welfare and prosperity of modern industrial states is believed to be so intimately tied up with economic expansion abroad that it will be difficult to convince any single nation, especially the larger and stronger nations, that its domestic welfare will be advanced more through a wise regulation of competition, under which the balance between production and distribution might be made more stable, than by the present condition of *laissez faire*. In the second place, there is the serious technical difficulty of adjusting so complex and delicate a matter as the commercial intercourse of states by any fixed rules of law. Assuming every reasonable readiness on their part to do justice to their mutual claims, the nations would still be confronted in drawing up any general agreement with the elusive human factors governing business relations, to which only the most general rules could be applied.[1] Tentative regulation, prohibiting certain unfair practices and maintaining the policy of the "open door" in disputed areas, would appear to be the first practicable objective.[2]

[1] The experience of the United States in attempting to frame an adequate anti-trust act will suggest the difficulty confronting a regulation of international competition.

[2] Compare the provisions of the treaty "relating to the principles and policies to be followed in matters concerning China," entered into at the close of the Washington Conference on the Limitation of Armaments, February 6, 1922. *Am. Journal*, XVI (1922), Supp. 64.

CHAPTER XX

INTERNATIONAL TREATIES

a. Treaties analogous to contracts under municipal law

In international law, treaties bear in many respects a close analogy to the contracts of municipal law. The function which they perform is, however, a much wider one. On the one hand, there are the compacts or agreements between two or more states by which the parties seek to promote interests peculiar to themselves which it would be impossible or inexpedient to regulate by a common rule of law. These treaties are almost identical with the contracts of municipal law. Thus a treaty providing for the cession of territory, such as the treaty between the United States and Russia in 1867, differs in no appreciable way from a deed of sale executed between two individual citizens of the same state. Again, the treaty of 1818, by which Great Britain granted to the United States special fishing rights on the banks of Newfoundland, was closely analogous to the creation of a similar servitude—for example, *profits à prendre*—under the rules of the common law. The same is true of treaties dealing with other special commercial interests, with the adjustment of boundary lines, or with the promotion of joint enterprises, such as the proposed deep-water canal connecting the Great Lakes with the sea. It will be observed, however, that within this field treaties play a much smaller part than the widely diversified contracts of municipal law.

Treaties in lieu of legislation

On the other hand, treaties have been resorted to by the nations for the protection or promotion of many interests which in the case of individual citizens are regulated, not by private contracts, but by common rules of law. This is explained by the limited scope of the rules of customary law, and by the absence of an international legislature competent to meet new issues by the enactment of statutory legislation. In consequence, states have been obliged to do for themselves, two by two or in small groups, what the community of nations as a whole has been unable to do. Since the defense of national existence is the primary interest of every state, the most important treaties are those of alliance, guarantee, or neutralization, by which the parties have attempted to secure a

measure of protection for themselves which the community of nations, in its existing state of organization, was unable to furnish. Should the League of Nations, acting in pursuance of Article 10 of the Covenant, succeed in securing for its members the protection of their national existence and other lesser rights, the reason for treaties of alliance would gradually disappear.

Apart from these treaties having a defensive object in view are others looking to the promotion of interests which in their general aspect are common to the great body of states, but which by reason of divergencies of local law it has been found more convenient to regulate by bilateral agreements. Such, for example, are treaties of extradition providing for the surrender of fugitive criminals. Because of differences in the criminal law of separate states, and particularly differences in the conception of political as distinct from strictly criminal offenses,[1] states have thus far been unwilling, or at least have neglected, to conclude a general international convention covering the subject of extradition. The failure to conclude such a general convention has made it necessary for the nations, two by two, to conclude separate treaties which, if actually concluded by each nation with every other, would amount in number to some thirteen hundred. The growing similarity of modern treaties of extradition would suggest that in due time the separate treaties may be replaced by a single rule of law.[2] In like manner the numerous treaties of amity, commerce, and navigation represent an attempt on the part of each state to establish relations with every other in matters where the conditions have varied sufficiently to prevent the adoption of a single common rule.

Law-making treaties

By contrast with these bilateral treaties, there are two groups of general treaties, or conventions, which have been called "law-making treaties," and which, although differing in other respects from the statutes of municipal law, do in fact express the common will of the parties upon the subject of the treaty. Certain of these treaties have dealt with the political interests of the nations, and have attempted to regulate and stabilize the relations of states one to another as separate political entities. Those concluded between a small group of states, such as the Declaration of Paris in 1856, have frequently been adhered to by other states and thus become

[1] See above, p. 214.

[2] The student may make comparison with Article IV, Section 2, of the Constitution of the United States which imposes upon the governments of the several States a common duty to deliver up fugitives from justice. See above, p. 217.

CHAP. XX

general law-making treaties. Others, such as the Hague conventions of 1907, became general treaties when ratified by a large majority of the parties to them.[1]

Treaties creating international unions

A far larger group of such general treaties deal with social and economic interests regarding which there has been little or no room for divergent policies, so that a common agreement could be reached and a statutory law adopted. These treaties or conventions have created such distinct corporate bodies as the Universal Postal Union, founded in 1874, the Union for the Protection of Industrial Property, founded in 1883, and numerous others, each as a rule having its central office in some one city and possessing a permanent organ or agency endowed with administrative powers.[2] Until 1919 these unions, with their annual or occasional conferences or congresses, operated for the most part as distinct and separate units, each independent of the other both in respect to the convention by which it was created and in respect to the administrative agency through which it exercised its functions. Upon the adoption of the Covenant of the League of Nations, provision was made for their centralization.[3] Should they ultimately come to be placed under the direction of the League, they would apparently thenceforth be regulated by resolutions of the Assembly and Council acting as legislative bodies, rather than by amendments to their separate conventions.

b. Legal nature of treaties

Treaties may be defined as compacts entered into between sovereign states for the purpose of creating new rights and duties or defining existing ones. Publicists have disputed as to the extent to which the rights and duties thus created have legal validity. It would seem that a definite answer may be given in the case of the general law-making treaties, entered into by a large group or by the entire body of states. Such treaties represent, for the time of their duration, the direct common interest of the parties upon the particular subject of the treaty, and they have legal validity as expressing the collective will of these states.

The term "law-making" regularly applied to these conventions must, however, be understood in a descriptive and analogical rather than in a strictly legal sense. They approximate to statutory legislation,[4] but they differ from it in several important respects. In the first place, there is no element of authoritative command in them, since they become binding only between the powers which

[1] See above, p. 64.
[2] See above, p. 65.
[3] See above, p. 49.
[4] See above, p. 64.

decide to sign them, leaving others free to remain outside the agreement and be governed by the former law, if any. In the second place, their force is qualified by the fact that, as generally provided, an individual signatory power may, upon giving due notice, denounce the convention and thereby release itself from the obligations it has assumed.[1] In a few instances, such as the Declaration of Paris of 1856, and the second of the Washington treaties of 1922 relating to the use of submarines and noxious gases in warfare, in which no provision is made for denunciation and separate withdrawal, the binding force of the treaty would seem to be equivalent to that of a strict international contract.

Bilateral and limited multilateral treaties

On the other hand, bilateral treaties, or multilateral treaties dealing with objects primarily of interest to the small group of signatory powers, depend for their binding force upon a different principle. Here the international community is indifferent to the subject-matter of the treaty and is concerned solely with seeing that the parties live up to the bargain into which they have entered. One of the oldest rules of international law is that of the sanctity of treaty obligations.[2] That good faith should be kept between states in respect to their contractual agreements has long been regarded as not merely a matter of moral duty as between the particular parties to the treaty, but as a matter of common concern to the whole body of states.[3] Unless the pledged word of a state could be relied upon, it has been clear from the time when the conception of international law first took definite shape that the relations of the entire international community would be imperiled and law itself disappear. Hence international law has at all times put forth whatever sanctions were at its disposal, whether the public opinion of the nations at large or, on occasion, the collective intervention of the states more directly concerned, to enforce re-

[1] For the effect of such denunciation, see below, p. 340.

[2] Compare the impressive appeal made by Grotius, Book III, Chap. XXV: "For not only is each commonwealth kept together by good faith, as Cicero says, but that greater society of which nations are the members." (Whewell's trans.)

[3] Respect for the faith of treaty obligations was the principal argument in the appeal of President Wilson to the United States Congress on March 5, 1914, for the repeal of the law exempting American coastwise vessels from payment of tolls in passing through the Panama Canal. The President waived the existence of differences of opinion in the United States as to American rights under the treaty, asserting that the meaning of the treaty was not debated outside the United States, and that everywhere else the law was interpreted as constituting a discrimination, and should be repealed on that basis if on no other. *Am. Journal*, VIII (1914), 593. See also, addresses of Senator Root, January 21, 1913, May 21, 1914, *Addresses on International Subjects*, 207, 241.

CHAP. XX

spect for the obligations of a treaty. While, therefore, international law exercises no control over the terms of a particular treaty, or over the consideration given for the contract, it does impose upon the parties individually the legal duty of abiding by the agreement in good faith.

Sanctions for the observance of treaties

As in the case of other rules of international law, the sanction for the observance of treaty obligations has been frequently ineffective to secure its object. Public opinion of the nations at large has not always been adequate to prevent breach of contract when one of the parties has believed that its vital interests were at stake. The attitude of the German chancellor in 1914 toward the treaty providing for the neutralization of Belgium does not stand alone in indicating that circumstances may arise in which a state may believe itself to be released from the obligations of a treaty.[1] Collective intervention has been a more effective sanction, as shown, for example, in the results of the World War; but its action has always been uncertain, and its punitive effect has frequently been unable to make good the harm done. From time to time cases of alleged breach of contract have been arbitrated voluntarily by the parties to the dispute, as in the instance of the Japanese House Tax case;[2] and it is noteworthy that disputes relating to the interpretation of treaties have been considered as particularly suited to arbitration. But even where provision has been made for the arbitration of treaty disputes, as in the Root treaties of 1908, an exception has been entered in favor of the exclusion of questions affecting the honor and vital interests of the contending parties.[3] Thus the United States was able, subsequent to the conclusion of the treaty of 1908, to refuse to arbitrate its dispute with Great Britain over the interpretation of the Hay-Pauncefote Treaty of 1901.[4] Down to the present day suits for breach of contract have obtained only a qualified legal standing in international law.[5]

c. Classification of treaties

International law knows no formal classification of treaties. Like the contracts of municipal law, treaties are of the widest variety, dealing with the whole range of interests of international

[1] Doubtless the characterization of the treaty of 1839 by the chancellor as a "scrap of paper" (British Blue Book) was more frank than has been usual in such situations, but the facts of the case may be matched in other international incidents, e.g., in the annexation of Bosnia and Herzegovina by Austria-Hungary in 1908.

[2] See below, p. 334. [3] See below, p. 407. [4] See above, p. 276.

[5] See, however, the provisions of the "optional clause" attached to the protocol of signature for acceptance of the Statute of the Permanent Court of International Justice. Below, p. 414.

life. Methods of classification have at times been suggested by publicists in the interest of scientific precision and clearness, and several of them are helpful as throwing light upon the legal character of the engagement entered into. Thus the distinction between *unilateral* and *bilateral* treaties indicates whether the obligation is binding upon one party only or upon both parties. Unilateral in substance, if not in form, was the treaty between the United States and Cuba in 1903.[1] The distinction between *simple* and *conditional* treaties bears upon the absolute or qualified character of the obligation assumed, as in the case of a treaty of guarantee.[2] More important is the distinction between *executed* and *executory* treaties. Executed treaties, also known as transitory or dispositive treaties, deal with single acts, which are to be performed forthwith, and which, when performed, dispose of the matter once and for all. Of such character are boundary conventions and treaties of cession, which closely approximate to deeds of transfer and other executed contracts of municipal law. On the other hand, executory treaties are continuous, dealing with acts which are to be performed regularly whenever the occasion for them is present, or with exceptional acts which must be performed when the particular conditions specified in the treaty come about. Such are treaties of commerce and of extradition, and the numerous treaties establishing administrative agencies, which set up continuous relations between the parties for the life of the treaty. Such also are treaties of alliance, guarantee, and neutralization, which may operate over a long period of years without once calling for performance. The classification of treaties according to their object, distinguishing between general and special objects, or between political, social, and economic objects, has little or no bearing upon the legal nature of the obligations assumed, although it is a convenient method for a descriptive treatment of the substance of the treaty.

d. Formation of treaties; capacity of the parties

International law has long recognized as one of the distinguishing tests of a fully sovereign state that it should be able to contract freely with other states. But, as has been pointed out, the division of states into sovereign and semi-sovereign, while still an accepted part of international law, is neither logical nor strictly applicable to the facts of international life. Accepting the alternative standard of membership in the family of nations as the test of international personality, it will be seen that a number of states

[1] See above, p. 92.

[2] See above, p. 88.

have full international personality and yet have given up some measure of their treaty-making power. Treaties of neutralization, such as the Belgian treaty of 1839, limit the power of the state to enter into treaties of alliance with other states, but are not regarded as encroaching upon the formal independence of the state.[1] In the treaty of 1903 with the United States by which Cuba formally acquired independence, the new republic agreed not to enter into any treaty with a foreign state which would have the effect of impairing its independence or of authorizing any foreign power to obtain a lodgment in or control over the island.[2] The restriction, as will be noted, is of little practical consequence to Cuba.

On the other hand it is possible for states enjoying only a limited or qualified membership in the family of nations to enter into contractual engagements with states possessing full membership. It would seem, however, that international law has regarded these treaties, especially when made with the native tribes of Africa, as having considerably less legal validity than treaties between other states. At all events, violations of such treaties have taken place without giving rise to any apparent concern on the part of the community of nations as a whole. The treaty-making powers of the British self-governing dominions are exceptional. Canada, for example, has enjoyed since 1884 the right to negotiate commercial treaties with foreign countries, her agent acting for this purpose through the channels of the British Foreign Office. Later, her representative negotiated alone, but signed in conjunction with the British ambassador.[3] More recently, the Halibut Fisheries Treaty was signed by the Canadian minister alone, he acting on that occasion as the representative of the British Crown and holding full powers from it.[4]

In certain instances, such as that of the Germanic Confederation of 1815-66, the members of a confederation retain the right to enter into treaties with foreign nations, their capacity to contract being in such cases determined by the constitution of the confederation. Occasionally, as in the case of Bavaria under the German

[1] See above, p. 87.

[2] See above, p. 92.

[3] The question of Canada's right of separate and independent ratification of British treaties affecting Canada is referred to above, p. 99.

[4] The treaty was signed March 2, 1923. It should be observed that the United States, whether of intention or inadvertently, overlooked the official character of Mr. Lapointe as a Canadian minister and referred to the treaty as having been entered into with "Great Britain." See A. L. Lowell, "The Treaty-Making Power of Canada," in *Foreign Affairs*, September 15, 1923, pp. 12-22.

Empire, a member of a close federation retains the right to enter into treaties of a particular class.[1]

Powers of state agents

Prior to the development of modern constitutional governments, there was a clear rule of international law that the agents delegated by their governments to negotiate a treaty must have "full powers" to conclude a binding agreement. Since the decision of the monarch was final in point of domestic law, it was only necessary for him to authorize his agent to act in his name, and upon the signature of the latter the agreement become binding forthwith. Moreover, communication being slow, it was impossible for the agent to be in close touch with his government; so that it became necessary to confide in his skill as a negotiator and to accept as final the best bargain he could succeed in making. The works of the writers of the eighteenth century are consequently preoccupied with questions of the due authorization of diplomatic agents, and of the results which should follow in case an agent had exceeded his powers.[2] Cases might arise where an agent pledged his government to acts so clearly detrimental to the state that good faith did not require the acceptance of the terms. Or again, an agreement might be concluded by an agent in excess of the powers intrusted to him, and on the strength of it acts might be performed by the other party to the advantage of the state before it could repudiate the acts of its agent. What were the obligations of the state benefiting by such an agreement? It was clear that restitution must be made, and as far as possible conditions must be put back where they were before.[3] In many instances this presented serious practical difficulties, especially in the case where the agreement was made between military commanders in the field.[4] These and other

[1] It is a question of constitutional rather than of international law whether a state, such as the United States, has the power under its constitution to enter into treaties of a certain character, which, for example, might change its form of government. While foreign governments may reasonably be expected to take into account the constitutional capacity of the government with which they are contracting, it is clear that, in so far as international law is concerned, the United States as an international person has full capacity to contract whatever impediments its domestic constitution may offer to the execution of the agreement. See Moore, *Digest*, V, §§ 735-736, where instances of conflicts between the treaty-making power and the Constitution are given. See also Wright, *Control of Am. Foreign Relations*, No. 31.

[2] See, for example, Vattel, *Droit des Gens* (Eng. trans.), Bk. II, §§ 207, 212, where numerous phases of the law of his time are discussed.

[3] Compare the rules laid down by Grotius, Bk. II, Chap. XV, § XVI, and Vattel, Bk. II, § 209, for the agreement known as *sponsio* made by a public official in excess of authority conferred or upon his own personal responsibility.

[4] The classic case is that of the agreement between the Roman consuls and the Samnites at the Caudine Forks, 321 B.C. See Vattel, loc. cit.

rules of the older law have now little more than historical interest, since international law at the present day recognizes that treaties become binding, not upon the signature of the diplomatic agents who have concluded them, but upon subsequent ratification of the agreement by the governments of the states parties to the treaty.

Ratification of treaties

Formal ratification has now become so far an accepted part of the conclusion of a binding agreement that states are now held to a knowledge of the constitutional law of the other party or parties to the treaty and have no legal ground of complaint in case the duly constituted authorities of a state repudiate the agreement signed in their behalf by their agents.[1] The doctrine of the older writers that ratification could not be legally or morally refused has long ceased to be a correct statement of the law.[2] Naturally a state will not lightly set aside an agreement entered into by its appointed agents, and it would soon lose standing as a responsible international person if it should give the impression of not knowing its own mind; but this is a matter of common discretion, not of law.[3] A relic of the older law persists, however, in the rule that, when ratified, treaties operate retroactively, taking effect from the date of signature. This rule is open to a number of objections, arising from the fact that during the interval between the signing and the ratification of the treaty its operation is necessarily suspended, and developments may take place which cannot conveniently be governed by stipulations of doubtful future validity. Even when it is possible to adjust the public rights of the contracting government

[1] The form in which ratification is carried out by each state differs according to the respective constitutions. In the United States ratification requires the consent of a two-thirds majority of the Senate, followed by the formal approval of the President. In Great Britain the Crown in Council (i.e., the Cabinet) has the constitutional power to ratify, as it has to negotiate, a treaty; but it is becoming customary for the Cabinet to submit the treaty signed by its agents to Parliament for its approval, as was done in the case of the Treaty of Versailles. A similar custom appears to be growing in other countries, whether or not it has yet come to be part of their constitutional law. In July, 1923, the Washington treaties relating to the limitation of armaments were ratified by the French Chamber of Deputies and Senate separately.

[2] Vattel, *Droit des Gens* (Eng. trans.), Bk. II, § 156, marks the transition to the later doctrine. In the case of the *Eliza Ann*, 1 Dodson 244 (1813), Scott, *Cases*, 438, Sir William Scott found the practice of ratification well established. For an instance in which the United States Government sought to hold a foreign government to the obligation to ratify, see Hill, *Leading American Treaties*, 172-173.

[3] The position of the United States in this respect is exceptional, in that, according to the traditional interpretation of the Constitution, the authority to negotiate treaties lies with the President, while the authority to ratify treaties is exercised by him subject to the advice and consent of the Senate. See Wright, *Control of American Foreign Relations*, Chap. XIV.

to the obligations of the treaty, the private rights of citizens may require separate treatment. Thus the Constitution of the United States makes it impossible for Congress to enact legislation called for by a treaty when it would have the effect of disturbing vested rights. In the case of Haver *v.* Yaker[1] the court held that the property of an intestate naturalized citizen should pass to his heirs under the old law, to the exclusion of certain other alien heirs whose rights were recognized by a treaty signed prior to Yaker's death, but not ratified until after his death.

Ratification with reservations

Since a treaty creates bilateral obligations, it must be ratified, if at all, in the same form in which it was signed. The insertion by one party of conditions or amendments of any kind would prevent the meeting of minds essential to a contractual agreement. It has, however, become customary for the constitutional authorities of states to propose amendments where the treaty as originally framed is unsatisfactory; and when approval of these is obtained from the other contracting party the modified agreement may be ratified with legal effect. Thus the amendments to the Treaty of Versailles proposed by members of the United States Senate, in the form of the "Lodge Reservations," would have required the acceptance of the other signatory powers before the ratification of the United States could have had legal effect. In such cases the negotiations may be regarded as continuing up to the time of ratification, the effect of the original signature being thereby waived. Ratification with reservations must be distinguished from ratification "with the understanding" that a specific interpretation is to be placed upon certain doubtful terms of the treaty.[2]

Ratification of the Hague Conventions

A special rule was adopted at the Hague Peace Conferences of 1899 and 1907 by which the general treaties or conventions drawn up by the conferences might be signed subject to reservations entered at the time of signature. The United States, for example, entered a reservation to the Convention for the Pacific Settlement of International Disputes with the object on the one hand of avoid-

[1] 9 Wallace, 32 (1869). Scott, *Cases*, 443. Evans, 339. The individual citizen is not presumed to know of the existence of a treaty until it has been ratified and proclaimed.

[2] It is a common practice of states to stipulate in advance, by means of such "understandings," the interpretation they place on particular clauses of the agreement. When these advance interpretations are acceptable to the other party, they remain as evidence of intent in case of subsequent disagreement, although perhaps not formally incorporated into the treaty. For example of an understanding formally incorporated, see Senate Resolution, March 4, 1923, ratifying the Halibut Fisheries Convention.

ing interference with the political questions of foreign states and on the other hand of protecting the Monroe Doctrine.[1] The effect of these reservations is somewhat uncertain. Undoubtedly they release the signatory state from any obligations otherwise imposed by the treaty, and it would seem that they automatically register corresponding reservations on the part of the other signatory powers as against the state making the reservations.

It is not clear what is the effect as between states which have ratified a multilateral treaty in a case where the defection of one of the original parties might indirectly alter the relations between all the others. Had the Treaty of Versailles been ratified by the United States Senate subject to the amendments proposed by the party in control,[2] the refusal on the part of the United States to assume certain obligations, notably under Article 10 of the Covenant of the League of Nations, might reasonably have been held by the other parties to have qualified their own mutual obligations in that respect.[3]

e. Acceptance under duress

Under municipal law, whether the common law of Great Britain and the United States or the civil law of continental states, contracts entered into under duress are not binding. To constitute a legal agreement there must be a free offer and a free acceptance. Duress, however, is with a few exceptions limited to physical coercion or intimidation, and does not include such moral coercion as is involved in taking advantage of the financial embarrassment or other material distress of a rival. By contrast, international law, having no final court of obligatory appeal for the adjustment of contract obligations, not only overlooks the duress incident to the economic pressure that may be brought to bear by a strong state against a weaker state, but has never questioned the validity of treaties of peace entered into at the conclusion of a war which has left one party in a position to impose its will upon the other.

[1] Tables of the various reservations entered to the Hague conventions may be found in *Hague Conventions*, 230-259; Higgins, *Hague Peace Conferences*, 527-537; Malloy, *Treaties*, II, 2386 ff.

[2] See above, p. 325.

[3] In this connection the student may investigate the validity of the argument put forward in Germany that the failure of the United States to ratify the Treaty of Versailles of 1919 limited the obligations of Germany under it, in so far as these had been assumed on the understanding that the United States, being represented upon the Council of the League of Nations and upon the various commissions intrusted with the execution of the treaty, would exercise an influence consistent with the principles which formed part of the terms of the armistice. For the separate question whether the terms of the treaty were consistent with the terms of the armistice of November 11, 1918, see below, p. 489.

Since war is a legal remedy for the redress of alleged wrongs,[1] treaties of peace are regarded as the price to be paid by the defeated party in redress of the injury which led to the war. That force and intimidation are actually present at the signing of the treaty is no more considered than is the fact that the state which has won the war may not be the one deserving redress. When Germany coerced France into signing the Treaty of Frankfort in 1871, the community of nations accepted the agreement as setting up a new legal situation, and questions relating to Alsace-Lorraine were thenceforth referred by third states to Germany precisely as if the provinces had been voluntarily ceded by France. In like manner third states raised no question as to the legal ownership of Porto Rico and the Philippines by the United States following the treaty of peace in 1898 by which Spain ceded the islands.[2] Violence or intimidation used against the persons of the sovereign or of his diplomatic agent, as in the case of the pressure brought to bear by Napoleon against Charles IV and Prince Ferdinand in 1808, would, indeed, invalidate the agreement concluded under such duress; but such cases are now of historical interest only, being no longer possible under the modern necessity of ratification by the home government.

Duress in relation to good faith

But while the community of nations recognizes the validity of treaties of peace, signed under duress, to the extent of maintaining relations with the signatory powers on the basis of the treaty, it would seem that the rule of good faith as between the parties themselves has been regarded as applying in but a limited degree to such agreements. Had France at any time after 1871 believed herself to be in a position to repudiate the Treaty of Frankfort, it is doubtful whether third states would have cast any reproach of bad faith against her for attempting to do so. Concessions obtained by force have apparently been enjoyed so long as force could hold them; and a shift in the balance of power has brought on new wars followed by new treaties in which the concessions granted have been handed back. Should a change of conditions make it possible for a previously defeated state to recover its lost territory, there would seem to be little distinction between the open repudiation of its former treaty and a declaration of war to accomplish the same purpose, under other pretexts, without reference to the treaty.

[1] See below, p. 428.

[2] The fact that a purchase price was paid for the Philippines did not affect the character of the agreement at international law. Outright cession would have conferred an equally valid title.

When, therefore, it is said that "in international law force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as vitiating the agreement, made in consequence of their use," [1] the statement can be accepted only as expressing a rule of law in so far as the recognition of the agreement by third states is concerned, not as implying that the agreement creates the obligation of good faith.[2]

The paradox of legally valid treaties of peace signed under duress appears conspicuously in the statement made by the German delegates at the time of signing the Treaty of Versailles: "Yielding to overwhelming force, but without on that account abandoning its view in regard to the unheard-of injustice of the conditions of peace, the Government of the German Republic therefore declares that it is ready to accept and sign the conditions of peace imposed by the Allied and Associated Governments." [3] This was a clear warning that Germany merely accepted the treaty without acknowledging any obligation of good faith in the execution of it should the military pressure be at any time removed. On the other hand, Germany appealed to its provisions as a working agreement in contesting the legality of the French occupation of the Ruhr in 1923.[4]

It is scarcely necessary to add that whether the treaty is entered into under duress or is a purely voluntary bargain, the presence of fraud or misrepresentation in the making of the contract would render it invalid. This rule, deducible from the general principle of good faith, obviously relates, however, to the case of fraud as to the subject-matter of the contract, not to fraud in respect to the motives leading to the conclusion of the contract. For example, in the negotiations preceding the conclusion of the Treaty of Portsmouth, in 1905, both the Russian and Japanese delegates made every effort to conceal facts tending to indicate domestic political conditions requiring a termination of hostilities irrespective of the fortunes of war.[5]

[1] Hall, *International Law*, § 108.

[2] Compare, however, the position taken by Lawrence, that the fact that treaties of peace "were extorted by force is no good plea for declining to be bound by them." *Principles of International Law*, § 134.

[3] Baker, *Woodrow Wilson and World Settlement*, II, 519.

[4] Compare the position taken by Peru and Bolivia in respect to the Treaty of Ancón of October 20, 1883, in accordance with which the provinces of Tacna and Arica were left in the possession of Chili subject to a subsequent plebiscite. J. B. Scott, "The Tacna-Arica Arbitration," *Am. Journal*, XVII (1923), 82.

[5] The rule of international law in this respect does not differ from the rule of the common or the civil law.

Duress apart from war: case of China

Apart from the duress incident to treaties of peace, numerous instances of the use of duress against a state to enforce the conclusion of a treaty are to be found in the records of recent international relations. In 1915, when the Great Powers of Europe were involved in war, Japan forced China to conclude a number of conventions embodying what became popularly known as the "twenty-one demands." China at first refused to enter into the agreements, which constituted a direct encroachment upon its sovereignty and independence. Japan applied the pressure of an ultimatum, and the conventions were finally signed, with the omission, however, of Group V of the "demands."[1] Asserting that it had acted under duress, China sought a revision of the treaties at the bar of the Peace Conference at Paris. Failing to obtain redress, China again presented its case before the Washington Conference of 1921-22. On December 14, 1921, the Chinese delegate urged that "in the common interests of the Powers as well as of China" the treaties be reconsidered and cancelled.[2] Later, on Februrary 2, the Japanese delegation urged that "if it should once be recognized that rights solemnly granted by treaty may be revoked at any time on the ground that they were conceded against the spontaneous will of the grantor, an exceedingly dangerous precedent will be established."[3] In reply the Chinese delegation pointed out "that a still more dangerous precedent will be established with consequences upon the stability of international relations which can not be estimated, if, without rebuke or protest from other Powers, one nation can obtain from a friendly but, in a military sense, weaker neighbor, and under circumstances such as attended the negotiation and signing of the Treaties of 1915, valuable concessions which were not in satisfaction of pending controversies and for which no quid pro quo was offered."[4]

While some of the obnoxious provisions of the treaties and notes of 1915 were modified by the conclusion of new treaties between the group of powers assembled at the conference,[5] they refused to consider the technical question of the binding force of the earlier treaties and notes; and at the conclusion of the conference China

[1] For the text of Group V of the "demands," see Willoughby, *Foreign Rights and Interests in China*, 418.

[2] Willoughby, *China at the Conference*, 174, 249.

[3] *Ibid.*, 251.

[4] *Ibid.*, 254.

[5] *Ibid.*, 368 ff. For the texts of the treaties of 1922, see also *Am. Journal*, XVI, Supplement, 64-74, 84-94.

CHAP. XX

declared its reservation of the right to seek relief on all appropriate occasions from those portions of the treaties and notes which did not appear to have been expressly relinquished by the Japanese Government.[1]

f. Treaties in violation of international law

Precedents are wanting to decide, other than by inference from general principles, whether a treaty would be void if in violation of the accepted rules of international law. Undoubtedly, if international law is law in any sense of the word, its rules must take precedence of any compact or contract between individual members of the international community. But when this has been said, there remains so much latitude of interpretation as respects the application of the rules of international law that contracts in violation of the general law may readily continue, and have in fact continued, to remain in force irrespective of their dubious character. Doubtless an agreement between two or more states to commit an international crime, such as the partition of Poland in 1774, would not be regarded by third states as giving rise to any degree of good faith which public opinion would wish to see respected if one or other of the conspirators should fail to keep the traditional "honor between thieves." Nevertheless, treaties of such a character have come in time to be accepted by third states as representing a state of fact, from which prescriptive rights have arisen, and to that extent public opinion of the international community has acquiesced in the original agreement and given it a qualified legal standing. On the other hand, an agreement between two states in violation of principles of international law, such as the freedom of the seas, in which third states had a direct and personal interest, would, it may be inferred, be promptly repudiated by them; and would not only be regarded as null and void, but be taken as an attack upon their rights even before any concrete act were performed in pursuance of the agreement.[2]

Treaties opposed to public morality

It is commonly said that treaties are not binding when their provisions are opposed to the principles of morality and justice.[3] But this statement can be taken to mean nothing more than that international law includes within its rules certain general principles drawn from the fundamental laws of human conduct, and that if a

[1] Willoughby, *op. cit.*, 260.

[2] See Roxburgh, *International Conventions and Third States*, 31 ff.

[3] See, for example, Oppenheim, *International Law*, I, § 505, where it is nevertheless admitted that "it cannot be denied that in the past many treaties stipulating immoral obligations have been concluded and executed, but this does not alter the fact that such treaties were legally [*sic*] not binding upon the contracting parties."

treaty were obviously to run counter to these it would not be recognized by third states as having binding force. To state a rule with such a condition attached to it is, however, to concede the rule's practical ineffectiveness. So long as the international community possesses no judicial body having jurisdiction over the whole field of contractual relations between nations, there can scarcely arise a situation in which third states will be in general agreement that a treaty entered into between two states is void, as under municipal law, on the ground of its being contrary to public policy. In 1907 Great Britain and Russia entered into an agreement by which, without the consent of Persia, they marked off for themselves spheres of interest in that country, and each agreed to respect the other's interests within their respective spheres.[1] The treaty unquestionably constituted a serious encroachment upon the actual, if not the formal, sovereignty of Persia, and might from that point of view have been said to be contrary to international public policy, if not to international law proper. The domestic conditions of Persia were, however, such as to make it possible for the parties to the treaty to assert philanthropic motives, and as a matter of fact the public opinion of the international community concerned itself very little with the affair. Again, the treaties of May 25, 1915, between Japan and China, even with the notorious Group V omitted, placed China against its will in a position of partial political and economic dependence upon Japan, which the public opinion of the international community, had not its chief members been engaged in war, would doubtless have regarded as detrimental to the peace of the Far East.[2]

g. Interpretation of treaties

Beginning with the treatise of Grotius, publicists have developed a large body of theoretical rules applicable to the interpretation of treaties. It is difficult, however, to assign any very definite legal validity to these rules, on account of the limited number of precedents illustrating their application. The absence of an international tribunal of obligatory jurisdiction has left this branch of international contractual relations to be worked out in each case by the parties to the particular treaty; with the result that disputes have been settled on the basis of concession or compromise, as the case might be, rather than on the basis of general principle. Nevertheless, the rules laid down by the publicists have acquired at least an inchoate legal value, inasmuch as formal deference has from

[1] For the text of the agreement, see *Am. Journal*, I (1907), Supplement, 400.
[2] See above, p. 329.

CHAP. XX

time to time been paid to them, even when the actual settlement of the dispute was worked out along different lines. Hence it seems proper to enumerate the more important of these general principles, with qualifications and illustrations drawn from the relatively few cases of their application. The close parallel between the rules of interpretation in international law and the corresponding rules of municipal law arises not only from the tendency of the earlier publicists to formulate their rules of international law upon the familiar basis of civil and common law jurisprudence, but from the fact that statesmen themselves, when at a loss to settle concrete cases, naturally fell back upon principles of interpretation with which they were already familiar in the law of private contracts.

Clear and specific terms not open to interpretation

The object of interpretation is to discover the understanding of the parties at the time the contract was entered into, not the design or motives of one or other of them in entering into the agreement. The understanding, or meeting of minds, must obviously be gathered from the terms themselves. It is the terms of the treaty which take legal priority in determining the alleged intention of the parties. Hence it is laid down that where the terms are clear and specific, no proof of an intention contrary to them is admissible.[1] This rule found application in the dispute between Great Britain and the United States over the meaning of the clause of the Hay-Pauncefote Treaty of 1901, which provided that the Panama Canal should be "free and open to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality."[2] On the side of the United States, it was contended that the term "all nations" should not be held to include the United States, since that country was the builder and owner of the canal and could not have had the intention to give up the right of preferential treatment for its own ships, especially when such treatment did not actually alter the basis upon which tolls were to be levied upon the vessels of other states.[3] On the side of Great Britain it was argued that the terms of the treaty were definite and explicit, and were at the same time in conformity with the conditions under which

[1] For a comment upon the conditions of his time, see the elaborate rules laid down by Vattel in 1758, *Droit des Gens* (Eng. trans.), Bk. II, Chap. XVII.

[2] Art. III, Sec. 1, Malloy, *Treaties*, I, 782.

[3] Memorandum of President Taft, August 24, 1912, accompanying the signature of the Panama Canal Act. *Proceedings*, Am. Society of Int. Law, 1913, p. 342. See also C. H. Stockton and others, "Does the expression 'all nations' in Article 3 of the Hay-Pauncefote Treaty include the United States," *Ibid.*, 93-150; *Analytical Index, Am. Journal*, sub tit. "Panama Canal,—Tolls Question."

the contract was entered into and with the consideration which had induced the making of the contract.[1] In the earlier dispute between the two countries over the interpretation of the Clayton-Bulwer Treaty of 1850 the United States sought to question the protectorate of Great Britain over the Mosquito Indians as being "from the nature of things" contrary to the object for which the treaty was concluded. On the part of Great Britain, however, it was argued that the terms of the treaty clearly referred to the existence of such protectorates and merely prescribed a limitation and restriction upon them, the assumption of the treaty being, therefore, that such a limitation and restriction was not "from the nature of things" impossible.[2]

Terms in conflict with object of treaty

When, however, the words of a treaty, if literally interpreted, run counter to the treaty's manifest object, the literal sense of the terms must not be held to exclude the broader interpretation required to accomplished that object. The classic example quoted in this connection is the stipulation contained in the Treaty of Utrecht (Article 9) that the port and the fortifications of Dunkirk should be destroyed and never rebuilt. Literally taken, the terms of the treaty left it open to France to build another fortress at Mardyck, at a distance of three miles from Dunkirk; and this France proceeded to do. Great Britain, however, protested against this evasion of the reasonable sense to be attached to the treaty, and in the end France acquiesced in the justice of the protest and abandoned the plan.[3]

Intrinsic and extrinsic evidence

Where the language of the treaty is doubtful, it has been laid down that the general sense of the words must take precedence of a technical sense, unless the latter conforms more to the character and circumstances of the agreement. Also, the sense must be adopted which yields a reasonable meaning to the treaty, which does not reduce it to an absurdity, and which does not bring it into conflict with the general rules of international law.[4] Supplementing this intrinsic evidence of the meaning of the treaty, external evidence has been regularly produced showing the intention of the parties at the time of the making of the contract. This intention may be gathered not only from statements made at the time, but from the circumstances leading up to the treaty, the

[1] *Am. Journal*, VII (1913), Supp., 46, 48.
[2] Hall, *International Law*, § 111.
[3] *Ibid.* For a recent instance, see G. A. Finch, "The Legality of the Occupation of the Ruhr Valley," *Am. Journal*, XVII (1923), 724.
[4] Oppenheim, *International Law*, I, § 554 (3).

CHAP. XX

objects sought by it, and the consideration given on both sides. Hall quotes the celebrated case of the dispute between Great Britain and Holland in 1756 as to the meaning of earlier treaties of guarantee by which each state guaranteed to the other all its rights and possessions in Europe against "all Kings, Princes, republics, and states," and specific assistance was promised if either party should "be attacked or molested by hostile act, or open war." Being called upon for help by Great Britain when at war with France, Holland urged an interpretation of the treaty as requiring assistance only in the event that Great Britain should be attacked without itself having been in the first instance the aggressor; otherwise the treaty would be in contravention of international law. As against this restrictive interpretation, Hall argues that the question whether an attack was aggressive or defensive was, in view of the complex causes of war, too open to argument to be subjected to a legal decision, precedent to the fulfilment of the treaty.[1]

Japanese House Tax case

In 1902 a dispute arose between Japan and the Western powers as to the effect of the treaties entered into in 1894-96 upon the perpetual leases provided for by earlier treaties. Failing settlement by diplomacy, the case was submitted to arbitration. The issue was the validity of a house tax which Japan claimed to be consistent with the exemption of the leased lands from all taxes other than an annual ground rent. The tribunal decided against Japan on the ground that both the actual practice of the parties under the old leases, and the intention of the negotiators of the treaties, indicated that the exemption of the land carried with it an exemption of buildings constructed upon it.[2]

Terms with different meanings

An exceptional case is that of a treaty in which terms are used which have a different meaning in the legal usage of the two contracting parties. The rule laid down for such cases is that the terms are to be understood according to the usage of the state in which they are to take effect, and if they are to take effect in both states, they must be given their proper meaning in each state. Hall cites the case of the treaty of 1866 between Austria and Italy, in which the "inhabitants" of the ceded provinces were to be allowed the privilege of withdrawal from the territory. As the word had different signification under Austrian and Italian law, it was interpreted in the Austrian sense, since the territory was Austrian at

[1] Hall, *International Law*, § 111. The student may compare the restrictive interpretation put by Italy in 1914 upon the terms of the Triple Alliance.

[2] For further details, see Scott, *Hague Court Reports*, 77-92; Wilson, *Hague Arbitration Cases*, 40.

the time of the signing of the treaty.[1] In the arguments before the arbitration tribunal of the Hague intrusted with the decision of the Japanese leases, Japan urged that the treaties be interpreted in the light of Japanese law, which had never considered buildings as forming part of land and permitted separate treatment of the two for purposes of taxation. On the ground, however, of the declared purpose of the treaties,[2] the tribunal ruled against the contention.

Most-favored-nation clauses

Special difficulties have arisen in connection with the interpretation of the "most-favored-nation" clause frequently inserted in commercial treaties. The purpose of this clause is to provide for an equality of treatment in commercial relations on the part of a particular state toward other states, and with this in view to provide that any subsequent privileges that may be granted to any one state shall be automatically extended to other states with which such treaties have been concluded. Disputes have arisen, as between the United States and Great Britain, whether, after concluding such an agreement, a state is precluded from entering into individual arrangements with a third state known as "reciprocity treaties," by which particular privileges are granted in return for reciprocal concessions from the other party. The United States has claimed that these latter agreements are based upon special advantages, which form the consideration of a contract quite distinct from the mere general commercial treaty.[3] On the other hand, Great Britain, France, and Germany have insisted that such reciprocity treaties do not form a class by themselves, and that the concessions made in them should be extended, in accordance with the most-favored-nation clause, to all other states with which the agreement has been made. In the case of Whitney *v.* Robertson,[4] suit was brought by certain importers to recover duties paid for the importation of sugar from Santo Domingo contrary, it was asserted, to the treaty of 1867 with that country, which provided that no higher duties should be imposed upon the importation of articles from the Dominican Republic than were or should be payable on similar articles from any other foreign country. A subsequent

[1] Hall, *International Law*, § 111.

[2] See above, p. 334. A further instance is to be found in the divergent interpretations by Italy and the United States of the term "persons" in the extradition treaty of 1868. See below, p. 343. (Charlton case.)

[3] See Moore, *Digest*, V. §§ 765-769; S. K. Hornbeck, "Most-Favored-Nation Clause," *Am. Journal*, III (1910), 395, 619, 797.

[4] 124 U. S., 190 (1887); Scott, *Cases*, 458.

treaty with the Hawaiian Islands had provided for the importation of specified articles from that country free of duty, in return for a like exemption from duty of specified articles from the United States. The court held that the provision in the treaty with the Dominican Republic was intended as a pledge that there would be no discriminating legislation against importations from that country, and that "it was never designed to prevent special concessions, upon sufficient considerations, touching the importation of specific articles into the country of the other." "It would," the court said, "require the clearest language to justify a conclusion that our government intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests." In so deciding, the court followed the earlier case of Bartram *v.* Robertson,[1] which involved a similar most-favored-nation clause with Denmark.[2]

Arbitration of disputed interpretations

In spite of the somewhat uncertain basis upon which rest the rules of interpretation above enumerated, nations have quite generally regarded disputes concerning the interpretation of treaties as peculiarly susceptible to arbitration. This has doubtless been because the issues in such cases are definite and concrete, and because, while the rules of general jurisprudence are not *per se* legally applicable, they nevertheless furnish a convenient standard by means of which the arbitration tribunal may be enabled to arrive at an equitable decision. In the Final Act of the Second Hague Peace Conference of 1907 the conference announced itself unanimous, not only in admitting the principle of compulsory arbitration, but in declaring that certain disputes, particularly those relating to the interpretation and application of international agreements, might be submitted to compulsory arbitration without any restriction.[3] The general arbitration treaties concluded by the United States in 1908, known as the Root treaties,[4] specifically provided that differences of a legal nature and those "relating to the interpretation of treaties existing between the two contracting parties" should, with certain exceptions, be referred to the Permanent Court of Arbitration. The Taft, or Knox, treaties of 1911

[1] 122 U. S., 116 (1887).

[2] For a historical review of the controversy between the United States and foreign states regarding the interpretation of the most-favored-nation clause, see Moore, *Digest*, V, § 765. The student will note that the position taken by the United States Supreme Court did not settle the question in point of international law.

[3] *Hague Conventions*, 27.

[4] See, for example, the treaty with Great Britain. Malloy, *Treaties*, I, 814.

specified differences arising by virtue of claims made by one party against the other "under treaty or otherwise."[1] Moreover, "cases of a legal nature concerning the interpretation of a treaty" were included in the outline of the jurisdiction of the new Permanent Court of International Justice, as drafted by the international jurists assembled at the Hague in 1920; but this article was subsequently amended by the Assembly of the League of Nations so as to give jurisdiction to the court, as of obligation, in such cases only upon the acceptance of an "optional clause."[2] Apart from these agreements relating to the arbitration of future disputes, the history of diplomacy shows a number of cases involving the interpretation of treaties which were in fact settled by arbitration, as, for example, the dispute as to the location of the St. Croix River, the Northeastern Fisheries dispute between the United States and Great Britain, the Chamizal dispute between the United States and Mexico, the Japanese House Tax dispute, and the Muscat Dhows dispute.

h. Effect of treaties upon third states

International law has no clear rule for determining what indirect effect treaties concluded between two or more states may have upon third states not parties to the agreement.[3] Statements are made in positive terms in many of the text-books, but the conflicting views of the different writers indicate the absence of any accepted customary rule.[4] The following rules may, however, be laid down tentatively, as in harmony with such precedents as are to be found in the modern practice of states.

Many treaties have been concluded since the beginning of the nineteenth century which, by the clear expression of their terms, have been intended by the contracting parties to be beneficial to third states. Where such treaties, as in the case of the Congo Treaty of 1885 providing for the free navigation of the principal rivers of the Congo basin,[5] contain an accession or adhesion clause, third states are at liberty to become parties to the original treaty, and by so doing they acquire legal contractual rights to what would have been otherwise no more than voluntarily conceded privileges. Third states not acceding to the treaty would seem to acquire no rights under it, contrary to the position assumed by the United

[1] Charles, *Treaties*, 385. [2] See below, p. 414.

[3] The student may compare the provisions governing the operation of contracts under municipal law. See Anson, *Law of Contract*, Am. ed., Part III, Chap. I.

[4] A summary of the views of publicists may be found in Roxburgh, *International Conventions and Third States*, Chap. III.

[5] See above, p. 266.

States in 1888, when, without having adhered to the Congo Treaty, the Government claimed the undisturbed enjoyment of free navigation as a "right." [1] In cases where the treaty contains no accession clause, as the Treaty of Berlin in 1878, it would seem that third states may sometimes, by subsequent conduct, acquire the rights granted by the treaty. Whether such subsequent conduct is to be regarded as an implied accession to the original treaty, or as the acceptance of an implied offer to conclude a separate treaty, is a legal technicality of no practical consequence. In all such cases there must be an assumption of the obligations of the treaty as well as of its rights. Serbia, Montenegro, Rumania, and Bulgaria were not parties to the Treaty of Berlin; but, having accepted and acted upon its provisions, they were generally regarded as *de facto* parties to it, although when Serbia and Montenegro protested against the annexation of Bosnia and Herzegovina by Austria-Hungary in 1908, their protest was dismissed as having no standing under the treaty.[2]

Treaties conferring privileges

Where a treaty confers privileges but no obligations, it would seem that the mere acceptance of the privileges by subsequent conduct does not give rise to rights under the treaty. Thus the treaty of 1881 between Argentina and Chile neutralizing the Straits of Magellan [3] gave rise to no new rights on the part of third states; so that if the treaty were to be withdrawn the protests of third states would have to be based upon the general principles of customary international law. Again, the Hay-Pauncefote Treaty of 1901 provides that "the canal shall be open and free to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality." [4] This is a voluntary grant of privileges to third states, which could set up no legal claim were the treaty to be dissolved by the contracting parties.[5] In 1912 the protests of Great Britain against the exemption of American vessels from payment of tolls at the canal were seconded by other states having maritime shipping interests, although the latter had under the law no rights in the case.[6]

[1] *U. S. For. Rel.*, 1888, I, 38; quoted by Roxburgh, *op. cit.*, 50.
[2] Roxburgh, *op. cit.*, 54. [3] See above, p. 271. [4] See above, p. 276.
[5] Roxburgh points out that the clause here quoted was adopted by the Senate as a substitute for the clause in an earlier treaty which made provision for the separate adherence of third states. *Op. cit.*, 63-68.
[6] Third states might, perhaps, acquire prescriptive rights under a treaty to which they were not parties, if, for example, they had been allowed the use of a canal during a period of years and had adjusted their domestic commerce to its facilities. See above, p. 276.

Remedial rights of third states

More difficult is it to determine the remedial rights of third states when their existing substantive rights are adversely affected by treaties to which they are not parties. Obviously, by inference from general principles, no state can be made to assume obligations in consequence of a treaty to which it is not a party.[1] Where, however, a treaty is incidentally injurious to a third state, right of redress will depend upon whether the injury is the result of a violation of a legal right, or is merely what is known in the English common law as a *damnum sine injuria,* a loss which involves no legal wrong. A treaty of the latter kind, such as a treaty conferring special commercial privileges upon a rival state, would give no right of redress. On the other hand, a treaty in violation of general international rights would give rise to a right of intervention on the part of the state injured by it. Or again, a treaty between States A and B which conflicted with another treaty between States B and C, would be a ground of complaint on the part of C, as, for example, when the Treaty of San Stefano between Russia and Turkey in 1878 conflicted with the Treaty of Paris of 1856.

i. Termination of treaties: performance

International law recognizes a variety of ways in which agreements legally entered into may terminate or become extinct. The most obvious of these is doubtless termination by performance of the acts called for by the treaty. An international contract of sale, such as the purchase of the Virgin Islands by the United States from Denmark[2] is discharged or satisfied, and in that sense terminated, when the object of the sale has been transferred and the price stipulated has been paid. Again, an agreement, such as that entered into by Czechoslovakia and by Poland with the Allied and Associated Powers under the Treaty of Versailles, pledging the enactment of certain municipal laws,[3] is fulfilled when the stipulated laws have been enacted; or a treaty pledging the dismantling of certain ships[4] is fulfilled when the ships have been dismantled. It should be noted, however, that in certain cases treaties which are apparently performed by a given act or acts continue in force so long as there is any possibility of the act or acts being undone and the former condition of things set up. In 1922 the United States

[1] An exception is to be noted in such cases as those of Serbia and the other Balkan states created by the Treaty of Berlin. Above, p. 90. In one sense, however, the acceptance of statehood by these states made them by implication parties to the treaty.

[2] See above, p. 233.

[3] See above, p. 91.

[4] As, for example, the first of the Treaties of Washington of 1922.

CHAP. XX

proposed to the Mexican Government that recognition might be accorded in the form of a treaty stipulating that the latter would amend its constitution so as to afford more adequate guarantees to foreign property interests. Had such a treaty been entered into, it would have remained in the background as a standard of future conduct on the part of Mexico, and to that extent would have been continuously valid and binding.[1] This binding force of the treaty even after the stipulated acts have been performed is further exemplified in certain executed treaties, such as boundary treaties or treaties of cession, whose object is carried into effect by the very terms of the treaty. In one sense these treaties do not terminate or expire; they remain on record as the evidence of a valid title on the part of the assignee to the territory or other object transferred by the treaty.[2]

Expiration of treaties in accordance with terms

By contrast with executed treaties, executory treaties, which deal with acts to be performed on specified occasions, or under specified conditions, may either expire in accordance with their own provisions or be dissolved by act of the parties or by force of circumstances. In both instances it is possible that the original object of the treaty may not have been attained, or may have been attained only in part.

Expiration in accordance with the definite provisions of the treaty is characteristic of a large body of treaties. Treaties of commerce and navigation have for the most part been concluded, as in the case of the treaty of 1911 between the United States and Japan,[3] for a definite period of years, in this instance twelve, following which the treaty is to continue operative until six months' or a year's notice has been given in advance. Other treaties may, at the close of the fixed period, be automatically renewed for a similar period unless denounced within a specified time. In other cases expiration of the treaty has been provided for upon the occurrence of certain conditions contemplated in the treaty.[4]

Dissolution by agreement

International law recognizes the possibility of the dissolution of a treaty by mutual consent of the parties in advance of the time

[1] Instead of the proposed treaty the parties entered into informal agreements embodied in the minutes of the negotiating commissions. See above, p. 114.

[2] The student will distinguish in international law, as in municipal law, between a contract of future sale and the contract, or deed, by which the property is actually transferred.

[3] Charles, *Treaties*, 77.

[4] See J. S. Reeves, "The Jones Act and the Denunciation of Treaties," *Am. Journal*, XV (1921), 33.

set for the treaty's expiration, or, if no time is set, in advance of the fulfilment of the object of the treaty. In such cases the treaty may be either completely set aside, or rescinded, or again it may be superseded by a new treaty more in accord with the existing wishes of the contracting parties, as in the case of the dissolution of the Clayton-Bulwer Treaty of 1850.[1] Dissolution by the unilateral act of one or other of the parties may take place in the case of commercial and other treaties after the definite period for which they were concluded has expired. It may also take place in connection with those general international conventions to which the great body of states are parties, when provision is made, as is commonly done, for the withdrawal of individual signatory powers upon giving due notice. The greater number of the thirteen conventions adopted at the Second Hague Conference, for example, were without time-limit; but provision was made that in the event of one of the contracting parties denouncing the particular convention, the denunciation should be notified to the Dutch Government and should not take effect until the expiration of one year after the notification had been given. Two conventions were concluded for specific periods, after which, unless denounced, they were to continue in force.[2] Of these the convention relating to submarine contact mines was made subject to denunciation at any time after upon due notice being given; the other convention, relating to the International Prize Court, was made subject to denunciation in advance of the six-year periods of automatic renewal.

Dissolution by force of circumstances

Treaties are in some cases legally dissolved, or better, perhaps, rendered void, by force of circumstances over which one or both of the parties have no control. This may happen when the international personality of one of the contracting parties becomes extinct. Treaties between Korea and other states formally terminated upon the annexation of that kingdom to Japan. The question whether in such cases the obligations of the extinct state must be taken over by the successor belongs rather to the law of international succession than to the law of treaty obligations in their strict sense.[3] In cases where a previously independent state becomes a member of a federation, and in so doing loses to a greater or less degree control over its foreign affairs, international law regards the act of entering the federation as one so closely

[1] See Art. I, Hay-Pauncefote Treaty. Malloy, *Treaties*, I, 782.
[2] *Hague Conventions*, 151, 188.
[3] See above, p. 117.

CHAP. XX

affecting the welfare of the state as to absolve it personally from its treaty obligations, provided these are taken over to the extent necessary by the federal state.[1] On rare occasions treaties become void by reason of physical impossibility of performance. The extinction of the object of the treaty, as if seals were to disappear from Bering Sea, or the island of Yap were to be submerged as the result of an earthquake, would obviously release the parties to the two treaties from their obligations. Or again, the arising of conditions physically or morally incompatible with the fulfilment of the treaty would either render it void, or at least suspend its operation until such time as conditions had changed. Such, for example, would be the case if a state, having contracted to buy territory at a stipulated price, should suddenly become involved in war with a third state and be prevented thereby from raising the necessary funds. In 1871 the United States customs officers declined to extend to British Columbia concessions granted by treaty to the Dominion of Canada before that province had been admitted into the Dominion; and their action was acknowledged by the law officers of the crown as consistent with the obligations of the United States.[2]

Violation of treaty by one party

The violation of a treaty by one of the contracting parties makes it voidable, or subject to cancellation, by the other party. This general principle appears to be an accepted rule of international law, but its application to concrete cases has raised difficulties. If a treaty is violated by a state in a minor detail, it is not clear whether the other party has forthwith the right to cancel the treaty as a whole. A majority of publicists, arguing *a priori*, concede such a right, owing to the impossibility of distinguishing between essential and non-essential stipulations.[3] Hall offers the "main object of a treaty," rather than any distinction between principal and secondary articles, as a "test which shall enable a candid mind to judge whether the right of repudiating a treaty has arisen in a given case." A breach which is material to the main object liberates the other party from its obligations.[4] When, in 1886, Russia set aside Article 59 of the Treaty of Berlin of 1878,[5] the treaty as a whole was not canceled by the other powers in consequence, their action, however, being no indication of their

[1] See above, p. 118.
[2] Moore, *Digest*, V, 352.
[3] See Oppenheim, *International Law*, I, § 547.
[4] *International Law*, § 116.
[5] *Ibid.*, I, § 539.

rights in the matter. Nor is it clear whether, if one of a group of states violated even the essential provisions of a treaty, the other states are released from their obligations toward one another. In any case the treaty is not *ipso facto* canceled. The violation by Austria in 1908 of the Treaty of Berlin by the annexation of Bosnia and Herzegovina left the treaty intact as respected other territorial arrangements in the former European possessions of Turkey; although Bulgaria, itself a party to the treaty only by implied consent, made use of the same opportunity to throw off the condition of formal vassalage to Turkey imposed upon it by the treaty.[1]

Optional validity of a voidable treaty

The extradition of Charlton by the United States to Italy under the treaty of 1868 was contested by Charlton [2] on the ground that Italy had violated the treaty by its refusal to extradite its own citizens. The treaty called for the extradition of "persons," which in the technical usage of the United States included citizens. Since the obligations of an extradition treaty are reciprocal, Italy's action abrogated the clause of the treaty by which the United States agreed to surrender American citizens. The court held, however, that even if the action of Italy constituted a violation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically effect its cancellation. There was, said the court, no necessity that treaties of extradition be reciprocal, so that if the United States should choose to acquiesce in the position taken by Italy, consistently with the more comprehensive Italian criminal law, the treaty might legally remain binding, and the executive department be at liberty to surrender the fugitive.[3]

Treaties of guarantee

A special rule must be laid down covering the particular group of treaties known as treaties of guarantee. These treaties have as their object the maintenance of a definite political situation defined in their text. They are contracts creating a special sanction for special conditions which it is believed would not be adequately protected by the general sanctions of international law. When unilateral in character, such as the guarantee by the United States of the independence of Cuba by the treaty of May 22, 1903,[4] or of the independence of Panama by the treaty of Novem-

[1] See above, p. 91.

[2] In the form of a petition for a writ of habeas corpus to secure the release of the petitioner from detention under an extradition warrant. See above, p. 213.

[3] Charlton *v.* Kelly, 229 U. S., 447 (1913). Scott, *Cases*, 415; Evans, 340.

[4] See above, p. 92.

CHAP. XX

ber 18, 1903,[1] they differ in no way from other international compacts. When, however, a treaty of guarantee has been concluded between a group of powers, the question is raised whether a violation of its stipulations demands the individual intervention of one of the signatory powers to maintain the situation defined by the treaty. Two distinct issues are presented. If the guarantee has been given by each of the contracting parties severally, or by each of them severally and all jointly, as in the case of the guarantee of the neutrality of Switzerland and of Belgium, international precedents point to an obligation on the part of the signatory powers to take separate action to uphold the provisions of the treaty, whether these provisions are violated by a non-signatory or by a signatory state.[2] If, however, the guarantee has been given by several powers collectively, as in the case of the guarantee of the neutrality of Luxemburg in 1867, the entire group must act in concert to uphold the treaty as against any state not party to the treaty.[3] On the other hand, should the treaty be violated by one of the parties themselves, it is not clear whether the other signatories are under obligation to take joint action against the offender. In any event, there is no obligation upon any other power singly to take action alone. The collective guarantee is, indeed, an anomaly in international law, and would seem to amount to little more than a mutual pledge of good conduct on the part of the guarantors, rather than a determination to enforce such conduct from third states.[4]

j. Effect of change of circumstances

The most difficult problem presented by international treaties, and the one in respect to which the fundamental law of the faith of treaties has been put to its crucial test, is the question whether a state is released from its treaty obligations by reason of an essential change of the circumstances under which the treaty was concluded. On this point international law gives but a vague and unsatisfactory answer. Publicists would appear to be correct in stating as a rule of positive law the general principle that all international contracts are entered into under certain implied conditions, which accompany the express conditions of the treaty and are equally part of the "valuable consideration" which forms the essence of the contract.[5] Every contract, according to the Roman law, carries

[1] See above, p. 93.
[2] See above, p. 87.
[3] See above, p. 88.
[4] See above, p. 89.
[5] Hall uses the following language: "Neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into, and on the other

with it the implication, *rebus sic stantibus*. But when this is said, it remains to determine what are the implied conditions attending the making of a treaty. It is conceded that one of these conditions is that the treaty be faithfully observed on both sides; another is that the international personality and consequent freedom of will of the parties shall remain unchanged;[1] another is that the treaty must be consistent with international law and with the moral standards of the international community.[2] Moreover, it would seem to be generally accepted that it is an implied condition of every treaty that it be morally possible of fulfilment, which may be interpreted as meaning that a state cannot be expected to sacrifice its very existence to uphold its treaty obligations. "A treaty, therefore," says Hall, "becomes voidable so soon as it is dangerous to the life or incompatible with the independence of a state, provided[3] that its injurious effects are not intended by the two contracting parties at the time of its conclusion."[4] This rule is logically deducible from the general principle, itself deducible from the primary right of self-preservation, that a state cannot be presumed to have bargained away any part of its international personality unless it has done so in clear and explicit terms. Hence it is an implied condition that the treaty must never, by reason of any change of circumstances, have such an effect.

Views of publicists

But international practice records the breach of treaty obligations in numerous cases in which the justification of an essential change of conditions would appear to rest upon much less solid ground. Not only in the name of the national existence of the state, but in the name of its vital interests, its fundamental needs, its necessary development, states have declined to be bound by engagements which would hamper them in the pursuit of these objects. And in so doing states have had the support of publicists and writers, who have risked stating a general principle on the matter. Grotius dismissed the question with the observation that a change of circumstances did not affect a promise unless it was

hand a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered." *Op. cit.*, § 116. See also Oppenheim, *Int. Law*, I, § 539.

[1] Hall, *op. cit.*, § 116. It was perhaps on this ground that Prime Minister Baldwin asserted that "the breaking off of any part of Germany into a separate State" would at once break the Treaty of Versailles. *New York Times*, October 26, 1923.

[2] See above, p. 330.

[3] The case of Cuba under the treaty of 1903 (above, p. 92) might be cited in illustration of the exception.

[4] *Op. cit.*, § 116.

"most patently clear" that the original circumstances were part of the consideration of the contract.[1] Bynkershoek unhesitatingly rejected the suggestion of a unilateral repudiation of treaty obligations.[2] Vattel, familiar with the subtleties and evasions of statecraft, insisted that "only those circumstances because of which the promise was made are essential to it; and it is only a change in those circumstances which can lawfully hinder or suspend the effect of the promise."[3] With the growth of nationalism in the nineteenth century the caution of the older writers was succeeded by a bolder attitude. Heffter[4] and Bluntschli[5] both open the door to the repudiation of treaties on the ground that they conflict with the "rights and welfare" of the people, or are incompatible with the development of the state. A later German writer, Treitschke, goes to much greater length in asserting that no state need feel bound by treaties which pledge its future to another state; and, again, that when a state recognizes that existing treaties "no longer express the actual political conditions" it may request the other party to cancel the treaty, and if the request be not granted it may declare war and thus test whether the relative strength of the parties has not changed since the original conclusion of the treaty.[6]

A French writer, Hautefeuille, holds that "a treaty containing the gratuitous cession or abandonment of an essential national right, such, for example, as part of its independence, is not obligatory."[7] Bonfils lays down as the accepted doctrine that "a treaty should without question come to an end when the causes which gave rise to it have disappeared. With the passage of time this treaty has become useless or hurtful, because the relations of the states have been modified; their respective situations have been influenced by changes in their economic and political interests."[8] Quoting Bynkershoek, he holds that the treaty should be dissolved by mutual consent; but should this be refused, the resulting situation would inevitably be tense. Fiore, the Italian publicist, holds that "all treaties are to be looked upon as null which are in any way opposed to the development of the free activity of a nation,

[1] *De Jure Belli et Pacis* (Eng. trans.), Bk. II, Chap. XVI, § XXV.
[2] *Quæstiones Juris Publicæ*, Lib. II, Cap. X.
[3] *Droit des Gens* (Eng. trans.), Bk. II, § 296.
[4] *Völkerrecht*, § 98.
[5] *Das Moderne Völkerrecht*, §§ 415, 456.
[6] *Politics*, I, 28; II, 597 (trans, by Dugdale and De Bille).
[7] *Droits et Devoirs des Nations Neutres*, cited by Hall, § 116.
[8] *Manuel de Droit International Publique*, § 857.

or which hinder the exercise of its natural rights."[1] Oppenheim, writing at Cambridge, formulates the principle that when "the existence or the necessary development of a State stands in unavoidable conflict with such State's treaty obligations, the latter must give way, for self-preservation and development in accordance with the growth and necessary requirements of the nation are the primary duties of every state."[2]

Instances of international practice

The classic instance during the nineteenth century of the repudiation of treaty obligations on ground of an essential change of circumstances was the action of Russia in 1870 in declaring itself no longer bound by that part of the Treaty of Paris of 1856 which related to the neutralization of the Black Sea and to the restriction imposed upon Russia in respect to keeping armed vessels in that sea. In addition to alleging a violation of the treaty on the part of the other signatory powers, Russia pointed out that a material change in the conditions contemplated by the treaty had been brought about by the subsequent union of the Danubian principalities, acquiesced in by the Great Powers, as well as by the changes in the conditions of naval warfare incident to the use of iron-clad vessels.[3] When, at the close of the Franco-Prussian War, the powers were able to meet in conference at London, Russia was allowed to have her way; but at the same time she was publicly rebuked for her conduct by the publication of a declaration to the effect that "it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers, by means of an amicable arrangement."[4] This "principle" has occasioned much controversy. An examination of it suggests that it is either obvious, if it admits of qualifications,[5] or wholly at variance with international practice and morally untenable if it admits of no exceptions whatever.[6]

[1] *Nouveau Droit International*, Part I, Chap. IV. See the same author's *International Law Codified* (Borchard's trans.), § 835.

[2] *International Law*, I, § 539.

[3] See Holland, *European Concert in the Eastern Question*, 220-270.

[4] 61 *British and Foreign State Papers, 1870-1871*, p. 1198. Scott, *Cases*, 469.

[5] Hall comments as follows: "The general correctness of the principle is indisputable, and in a declaration of the kind made it would have been impossible to enounce it with those qualifications which have been seen to be necessary in practice." *International Law*, § 116.

[6] Lawrence observes that the doctrine "sounds well; but a little consideration will show that it is as untenable as the lax view that would allow any party to a treaty to violate it on the slightest pretext." *Principles*, § 134.

CHAP. XX

Annexation of Bosnia and Herzegovina

A more recent instance is to be found in the action of Austria-Hungary in 1908 in annexing the provinces of Bosnia and Herzegovina contrary to the terms of the Treaty of Berlin of 1878, by which it was agreed that the provinces should be "occupied and administered" by Austria-Hungary subject to the nominal suzerainty of the sultan. Reasons were not assigned by Austria-Hungary, but it was clear that the change of conditions in Turkey, which suggested the possibility of a reassertion of that country's formal rights, influenced the Dual Monarchy to anticipate the issue. Only two days before, Bulgaria, itself a party to the treaty of 1878 only by implied adherence, threw off the status of vassalage imposed by the treaty and declared itself independent.[1] The doctrine of necessity asserted by Germany in 1914 as a justification for the violation of the treaty of 1839 neutralizing Belgium[2] was distinct from the doctrine of an essential change of circumstances; although the latter was urged unofficially in many quarters as an additional ground of release from the obligation. In 1915 Greece refused to be bound by the treaty concluded with Serbia in 1913 by which mutual aid was pledged in the event of either party's being attacked by any other Balkan state.[3] Doubtless in this instance the fact that adherence to its obligations would have involved Greece in a war of unexpected proportions might be reasonably held to have amounted to an essential change of circumstances.[4]

General conclusions

The conclusion to be drawn both from the practice of states and from the dicta of publicists and writers is that as regards the binding force of a treaty under a change of essential conditions international law has at present no definite rule which does more than approximate to an accepted standard of conduct. Each case has been judged on its own merits and judged, it would seem, under circumstances which inevitably tended to produce a division of opinion among the members of the international community. In the absence of an international judicial agency having authoritative jurisdiction over the obligations created by treaties, each state has been left to determine the merits of its own case. In consequence,

[1] See above, p. 338.

[2] See above, p. 145.

[3] For the documents in the case, see *Am. Journal*, Supp. XII (1918), 86 ff.

[4] A recent instance of the application of the principle of *rebus sic stantibus* is to be seen in the argument made by France before the Permanent Court of International Justice to the effect that treaties made by Great Britain with Tunis and Morocco had lapsed in consequence of the new legal and judicial régime set up by France in the two protectorates. See above, pp. 98, 167, n. 2.

when by lapse of time treaties have come to impose a heavier burden upon one of the contracting parties than upon the other, the party so burdened has taken advantage of technicalities as a means of escape from its obligations. Moreover, the absence of an international executive agency protecting the fundamental rights of states has made the political existence of certain states so precarious that they have resorted to treaty agreements under circumstances equivalent to moral duress.[1] With the duress removed by a change of conditions, the obligations of the treaty have been regarded lightly. In more modern times the economic life of industrial states has become so dependent upon circumstances outside the state as to introduce wholly new conditions of secure existence, and to force states to reconsider obligations assumed under earlier conditions.[2] Again, owing to the failure of international law until recent years to attempt a solution of the problem of nationalities and to determine on its own merits the unit of national life to which the right of separate statehood was to be accorded,[3] a number of treaties were entered into which it was obvious to observers at the time represented nothing more than temporary adjustments, to be set aside when subsequent circumstances should make it possible.[4] There remains in the midst of this uncertainty merely the rule of good faith in its most general terms. The detailed applications of the rule in particular cases continue above the law, a matter for the moral conscience of the individual state, acting under a responsibility which international law creates but does not guide.

[1] As in the case of China in respect to the agreements with Japan in 1915. Above, p. 329.

[2] See above, Chap. XIX, b.

[3] See above, p. 106.

[4] Of such character, for example, was the Treaty of Vienna in 1815 in respect to the national status of Belgium, and the Treaty of Berlin in 1878 in respect to Bulgaria.

CHAPTER XXI

THE AGENTS OF INTERNATIONAL INTERCOURSE

a. Historical origins of the law

The law regulating the diplomatic intercourse between nations is one of the oldest parts of the general body of international law. Indeed, in some of its branches it antedates all other parts of that law. The records of ancient China, India, and Egypt show a respect for the person of ambassadors and for the sacred character of their office. The Greeks and Romans, while having no permanent embassies, recognized the right of sovereign states to send ambassadors, and received their envoys with great respect and accorded to them a personal inviolability supported by the strongest sanctions. In Rome the principle of exterritoriality found definite, if only partial, recognition.[1]

After the fall of the Roman Empire and the establishment of the feudal system, ambassadors became rather the personal messengers of princes than the formal representatives of states. But with the development of the independent Italian states in the fourteenth century, embassies took on a more formal character, particularly in the case of the papal representatives sent out from the Holy See to the various secular courts. By the fifteenth century the permanent inter-representation of states, in the form of resident embassies, made its appearance; and within two centuries an elaborate code of diplomatic procedure was built up. Questions of precedence and of the personal inviolability of the ambassador occupied the attention of statesmen and writers, and were the occasions of numerous disputes between states. Since the adoption in 1815 and 1818 of a formal classification of diplomatic agents there have been few changes in the law. Naturally, however, the actual importance of the ambassador's functions has greatly diminished in consequence of the development of more direct means of communication between states.[2]

The primary agents of international intercourse are the consti-

[1] For details, see Phillipson, *The International Law and Custom of Ancient Greece and Rome*, I, Chap. XIII.

[2] For a brief sketch of the origin and development of modern diplomacy, see Potter, *Introduction to the Study of International Organization*, Chap. VII.

b. Representative character of the head of the state

tutional heads of the separate states. While international law has no jurisdiction over the organization and personnel of a state's government, it recognizes the domestic constitutional law of each state to the extent of accepting as head of the state the person holding that position with apparent legal right. It is for constitutional law to determine whether the titular head of the state, British king or French president, for example, shall enjoy formal or actual powers of government; international law merely records that the legal head of the state has spoken or has taken action. Granted that a given government has been recognized as the *de jure* government of the state, international law recognizes the responsibility of that government and its legal successors for the state which it represents,[1] and justifies foreign states in concluding that the policies announced or the measures pursued by the government are in effect the will of the state. In consequence of this representative character of the head of the state,[2] certain formalities and courtesies attend the visit of the monarch or president of one state to the head of another state, and the privileges and immunities regularly extended to ambassadors are extended to them with scrupulous exactness.[3] Moreover, however limited his actual powers have come to be within recent times, the head of the state continues to be the personality in whose name ambassadors and ministers are sent from one state and received by another. In other respects, however, the old rules conditioned upon the actual exercise of governmental power by the head of the state have been to a considerable degree modified by the general adoption of democratic constitutions.[4]

The secretary of foreign affairs

As in the case of the head of the state, so in that of the subordinate officer intrusted with the conduct of foreign affairs, it is for constitutional law to determine the organization and functions of his office in respect both to the diplomatic representation of the state in foreign countries and to the supervision of the conduct of the particular persons to whom that task is confided. On the other hand, international law deals with the relations between the foreign secretary and the diplomatic representatives of other states. A number of rules, many of them of little intrinsic importance, have

[1] See above, p. 112.

[2] In the case of the Government of the United States, with its legal separation of the powers of government, the President, as being intrusted with the duty of conducting foreign relations, holds the position corresponding to that of the head of the state.

[3] See above, p. 185.

[4] See below, p. 358.

CHAP. XXI

been developed prescribing the procedure by which official communications are exchanged and interviews held between the foreign secretary and the group of resident ministers known collectively as the "diplomatic corps."[1] Moreover, modern international practice makes the secretary of foreign affairs the responsible medium of negotiations with foreign states, so that documents sent out in the name of the state are signed by him and negotiations are conducted in his name. International usage, however, prescribes that, as a general rule, the foreign secretary of one state shall communicate with the foreign secretary of another through the medium of the diplomatic agents resident in the state to which the communication is sent.[2]

c. The "right of representation"

The question whether states have a "right of representation," or a "right of legation," has been a subject of controversy among writers.[3] Arguing from accepted general principles, the very existence of a community of nations would seem to present the necessity of intercourse among its members, so that by inference one state must, when the emergency calls for it, have the right to send its agents to another state, and must be under the duty of receiving agents sent by other states under similar circumstances. Beyond this, the discussion becomes academic. As a matter of fact, for several centuries states have regularly maintained permanent diplomatic representatives at the capitals of foreign states, and no state could at the present day cut itself off from communication with the rest of the world without forfeiting its position in the community of nations. A state might, indeed, refuse to receive an envoy sent to it for an object upon which it does not desire to negotiate; but this would be no more than equivalent to a refusal to discuss the subject with the envoy when already arrived.

It is still, however, a question to determine which states have a right of representation, and which of two or more contesting governments is entitled to exercise that right. International law formerly decided the first point by distinguishing between sovereign and semi-sovereign states, recognizing in the former a complete right of legation, and denying it in whole or in large part

[1] See Satow, *Guide to Diplomatic Practice*, I, Chap. VII. The procedure followed by American diplomatic agents may be found in *Instructions to Diplomatic Officers of the United States.*

[2] The more recent practice, illustrated by Lord Balfour's note of August 1, 1922, of "direct diplomacy," in the form of an appeal from the foreign office of one state to public opinion in another state, is still too new to be classed as a customary rule.

[3] See Satow, *op. cit.*, I, Chap. XII.

to the latter. The distinction, however, between sovereign and semi-sovereign states, always ill defined, has now ceased to correspond to the facts of international life.[1] Consequently, at the present day the rule of international law can only be tentatively laid down, to the effect that states whose membership in the community of nations is unrestricted, or restricted only by minor qualifications,[2] have the right of representation; while states enjoying only partial membership do not commonly enjoy the right, although they may enjoy it under exceptional circumstances. Should Canada, as has been officially discussed, be given some form of diplomatic representation at Washington, that fact need not alter its position as a member of the British Commonwealth enjoying only a limited membership in the community of nations.[3] It should be observed that the actual exercise of the right of legation has on occasion been referred to in evidence of the international status of a given community. In the case of the *Charkieh,*[4] the court cited the fact that "no attempt appears to have been made on the part of the Pacha to exercise the principal attribute of sovereignty, namely, the *jus legationis,* to be represented by an ambassador or diplomatic agent at the court of foreign sovereigns," as proof that the khedive was not the sovereign of an independent state.

Case of two conflicting governments

The point as to which of two or more contesting governments is entitled to exercise the right of representation is answered by the rules of international law concerning the recognition of new governments.[5] When a *de jure* government has been overturned by domestic revolution, the diplomatic representatives of the former government continue to exercise their functions, at least nominally, until the *de facto* government has been formally recognized as *de jure.* Thereupon the foreign governments granting such recognition must maintain relations only with diplomatic agents representing the new government. By reason of the lack of precedents, no rule exists covering the case of a diplomatic agent who continues, owing to the failure of foreign governments to recognize a new revolutionary government, to exercise his functions long after the government which sent him has ceased to exist. The official relations maintained by the United States with the

[1] See above, p. 93.

[2] See above, p. 90.

[3] The exceptional status of the British self-governing dominions is discussed above, p. 99.

[4] L. R. 4 Adm. & Ecc., 59 (1873). Scott, *Cases,* 29.

[5] For the general principles governing the recognition of new governments, see above, p. 112.

CHAP. XXI

Russian ambassador, Bakhmeteff, an appointee of the Lvoff Government, for a period of over four years, during which his representative character was repudiated by the *de facto* Bolshevik Government, was in conformity with technical rules, although, it would seem, in contradiction of the general principles of the law.[1] In certain cases, as in that of the Confederate States of America from 1861 to 1865, where a community in revolt against the state of its former allegiance has been recognized as a belligerent, foreign states may conduct informal negotiations with the *de facto* government, looking to the protection of their national interests.[2] The belligerent community has, however, no "right of representation," and formal diplomatic relations may not be maintained by third states with it without giving legal offense to the *de jure* state.

d. Classification of diplomatic agents

The annals of the seventeenth and eighteenth centuries are full of conflicts between large and small states as to questions of precedence in diplomatic rank. In spite of the theoretical equality of sovereign states, the marked political inequalities, supported by the ambition of governments and the personal vanity of princes, brought about a constant struggle for the enhancement of national prestige by the relative position accorded to the diplomatic representatives of the state. The representatives themselves were not backward, on occasion, in asserting the dignity of their state as evidenced in the honors shown to their own person.[3] The matter was further complicated by the different functions performed by diplomatic agents. The early *ambassadors* of the fifteenth century not only conducted the business of their sovereign, but represented his person as well. Shortly after, the practice developed of sending agents, later known as *envoys* or *envoys extraordinary,* who carried on the affairs of their sovereign without representing his person. Again, there were *residents* ranking below envoys, but otherwise performing much the same functions. Still again, there were *ministers* or *ministers plenipotentiary,* whose representation of their sovereign was likewise below that of ambassador.

[1] See letter of Mr. Bakhmeteff to Secretary Hughes, April 28, 1922, and reply of the secretary, April 29, 1922. For editorial comment on the case, see *Am. Journal,* XVI (1922), 426.

[2] See above, p. 108.

[3] Wicquefort's treatise, *L'Ambassadeur et ses Fonctions,* published in 1679 and translated into English by John Digby, *The Embassador and His Functions,* cites numerous instances of the competition between ambassadors concerning honors and rank. Bynkershoek, writing in 1721, gives evidence in his *De Foro Legatorum* of continued contests. But by 1758 Vattel was able to lay down more definite rules based upon accepted usage. *Droit des Gens* (Eng. trans.), Bk. IV, §§ 69-75.

At the Congress of Vienna, in 1815, an effort was made "to prevent in the future the inconveniences which have frequently occurred, and which may still occur, from the claims of precedence among the different diplomatic characters" by dividing them into classes; (1) ambassadors, legates, or nuncios, which alone were allowed to represent the person of their sovereign; (2) envoys, ministers, or other persons accredited to sovereigns; (3) *chargés d'affaires,* accredited to ministers for foreign affairs.[1] It was further provided that within each class diplomatic representatives should rank according to the date of the official notification of their arrival. The result of this provision was to make it possible for the representatives of small states to take precedence, by virtue of length of service, over the representatives of the Great Powers within the same class. In consequence, a further rule was adopted at the Congress of Aix-la-Chapelle in 1818, creating a fourth class of *ministers resident,* accredited, like envoys and ministers, to sovereigns, but of lower rank.[2] Within this class the representatives of minor states found the less conspicuous place intended for them.

It should be observed that while no state is under obligation to send a particular grade of representative, custom has practically decreed that the smaller states shall not appoint representatives of the first class. Until 1893 the United States confined itself to representatives below the first class, but in that year ambassadors were sent to several of the Great Powers, and at the present day the number of such representatives, including posts not filled, has reached fourteen.[3] The older rule, still in formal existence, that ambassadors alone possessed the representative character, and might in consequence demand at any time an interview with the sovereign of the state, has ceased to have any real meaning, now that the control of foreign affairs has passed into the hands of cabinet officers. For the same reason it is at the present day of little consequence, apart from ceremony, that the first three grades are accredited to the head of the state, while *chargés d'affaires* are accredited to the minister for foreign affairs.

The group of foreign diplomats resident in each state forms collectively what is known as the "diplomatic corps" and is pre-

[1] Satow, *op. cit.,* I, 244. [2] *Ibid.,* I, 245.

[3] Ambassadors are now sent by the United States to the Argentine Republic, Belgium, Brazil, Chile, Cuba, Germany, Great Britain, France, Italy, Japan, Mexico, Peru, Spain, and Turkey. Russia and Austria-Hungary formerly received them.

CHAP. XXI

sided over by the oldest ranking member, or "dean"; and while this loose organization has no corporate character in point of law, it has at times acted in concert where the emergency called for it, as at Peking in 1900 at the time of the Boxer riots.

Appointment of diplomatic representatives

International law contains no positive rules regarding the personal character or qualifications of the persons appointed by a state as its representatives abroad. States are not, however, so far free in the choice of their agents as to have the right to send particular persons to a foreign government when, for good reason, the foreign government does not wish to receive them. The law draws no clear line between what are and what are not "good reasons" for refusing to receive a particular person, precedents being too few to permit the formulation of a customary rule. Political, social, and religious reasons have, on one occasion or another, been assigned. A conspicuous instance in the annals of the United States is that of Mr. Keiley, who, on being sent as minister to Italy in 1885, was refused reception on the ground that fourteen years earlier, at a public meeting in the United States, he had protested against Italy's annexation of the Papal States. Secretary Bayard recognized the "full and independent right" of Italy to decide the question of personal acceptability of an envoy from another government.[1] When, however, Mr. Keiley was accredited to Austria-Hungary, and that government requested that his nomination be withdrawn, stating that "the position of a foreign envoy wedded to a Jewess by civil marriage would be untenable and even impossible in Vienna,"[2] President Cleveland refused to acquiesce in the reasons assigned, and in his annual message to Congress in 1885 asserted that he could not acquiesce without "violation of my oath of office and the precepts of the Constitution." The tangled legal situation may be seen in the admission of Secretary Bayard of the "right" of a foreign state to exercise its own discretion as to the reception of an envoy, followed by President Cleveland's rebuke in the form of making no new nomination and leaving affairs for two years in the care of the secretary of the legation.[3] When the Chinese Government refused to receive Mr. Blair as minister of the United States because as a senator he had participated in the enactment of the exclusion legislation, President Harrison felt justified in entering a public protest.[4]

In its correspondence over the Keiley case, the Austro-

[1] See Moore, *Digest*, IV, 480.
[2] *Ibid.*, 481.
[3] *Ibid.*, 483.
[4] *Ibid.*, 484.

Hungarian Government called the attention of Secretary Bayard to "the generally existing diplomatic practice to ask previously to any nomination of a foreign minister the *agrément* (consent) of the government to which he is accredited."[1] Mr. Bayard rejected the validity, as well as the practicability, of the rule; but with the appointment of ambassadors in 1893 the Department of State acquiesced in the practice of inquiring beforehand of foreign governments whether the proposed nominee of that rank would be *persona grata* to them; and the practice may now be said to have become an accepted rule.

Inquiry before appointment

Once appointed to his post, international law prescribes that the diplomatic agent shall be armed with certain documents which are the credentials of his office. A "letter of credence," addressed by the head of the state sending the public minister to the head of the foreign state, identifies the minister and designates his rank and the general object of his mission; at the same time, it asks that the minister be received favorably, and that full credence be given to what he shall say on the part of his state.[2] In the case of *chargés d'affaires,* the letter of credence is addressed by the foreign secretary of the one state to the foreign secretary of the other. Where the minister is sent to fill the regular post of permanent representative, his letter of credence generally constitutes his official authorization to perform the routine duties of his office. When, however, a diplomatic agent is sent to perform a particular task, usually the negotiation of a treaty or convention, or when the permanent minister is called upon to undertake similar duties, a document known as "full powers" is also given him, the object of which is to inform the foreign government of the authority conferred upon him by his government, and of the extent to which he may go in negotiating in behalf of his government.

Credentials of office

In earlier times, before the practice of ratifying treaties came to be the accepted rule, it was a matter of consequence for foreign governments to ascertain accurately the scope of the powers of diplomatic agents sent to negotiate with them; but at the present day there is little room for mistake. When envoys or ministers are sent to general international conferences or congresses, the letter of credence is usually omitted, and full powers, or general full powers, alone are given. These are not presented to the govern-

[1] See Moore, *Digest,* IV, 481.

[2] A sample form may be found in Wilson and Tucker, *International Law,* 8th ed., p. 172.

CHAP. XXI

ment of the state in which the congress is held, but are mutually "exchanged" by the assembled delegates when the treaty or convention is about to be signed. In addition to the above documents, or letters patent, diplomatic agents also receive from their home governments general or special "instructions" for the conduct of the business intrusted to them; but these are of no concern to international law.

The reception of diplomatic agents

International practice contains a certain number of customary rules regulating the reception of diplomatic agents when they have arrived at the seat of the government to which they are accredited. The only rule of even technical importance is that the public minister does not officially become the representative of his state until he has been "received" by the head of the foreign state. This reception must be a public one in the case of ambassadors, and need only be a private one, though it is generally a public one, in the case of ministers of the second and third grades. Other rules regulate the notification to be given of the arrival of a public minister, the privileges and immunities accorded him before his official reception, and details of ceremonial.[1] Whether these rules have attained a legal status is perhaps an academic question. In any event they are of such little intrinsic importance that a breach of them is no more than bad form, unless a deliberate insult should be intended.

e. Functions of diplomatic agents

The functions or duties performed by diplomatic agents are primarily determined by the municipal law of their home states. Certain of these functions are purely domestic, in the sense that they do not bring the minister into contact with the foreign government. Such, for example, are the registration of births, deaths, and marriages of citizens of the minister's home state. Again, other functions bring the minister into contact with the foreign government in an unofficial way only. Such is the duty imposed upon the minister by his government of observing and making reports upon political, commercial, and social conditions in the foreign country, and, in particular, upon the attitude of the foreign government and of public opinion with respect to matters which might prove a cause of friction between the two countries. A third group of functions brings the minister into direct and official contact with the foreign government. Here international law intervenes to prescribe certain rules of procedure, and to impose cer-

[1] See Satow, *op. cit.*, I, Chap. XV.

tain restraints upon the minister in the interest of promoting coöperation and preventing friction between the two countries.

Relations with the foreign office

The procedure to be followed in presenting demands for the extradition of fugitive criminals offers no difficulty, the burden being upon the home government to see that the proper evidence of guilt accompanies the demand. The issuance of passports to citizens of the minister's country merely requires an investigation of the actual nationality of the applicant. In time of war between the local government and a third state the former may demand of foreign representatives, as was done by the German Government in 1914, that passports issued by them shall receive the visé of the local government before being valid to secure the free departure of alleged citizens of the home states of the several embassies. An important function of public ministers consists in affording protection to the person, property, and other interests of citizens of their home state. In such cases, where the injured individual has failed to secure redress through the intermediation of the consular representatives with the judicial or executive authorities of the local government, the diplomatic representative may take up the affair directly with the foreign office, and the matter is then judged according to the rules of international law. In no case may the diplomatic representative negotiate with any other officer of the local government.

Restraints upon public ministers

In pursuance of their function of observing the progress of events in the country to which they are accredited, public ministers are forbidden by international law to interfere, whether by word or deed, with the internal political affairs of the local government. Discussion of pending legislation is debarred, as are also controversial questions of party politics. In the United States criticism by a foreign diplomat of speeches made in the houses of Congress is a breach of rule which is likely to be sharply resented. Minor infractions of these rules may be overlooked by the local government, as in the case of the adverse comments made in 1923 by the Italian ambassador on pending tariff legislation.[1] More serious breaches may lead to a demand by the local government for the recall of the offender.[2] Diplomatic etiquette likewise forbids public ministers to correspond with the press upon matters which are the subject of official communication, or to publish a note or des-

[1] See *New York Times*, June 6, 8, 1923, where the criticisms of Senator Watson and the defense of Ambassador Ricci are given.

[2] For examples, see below, p. 369.

patch from their home government before it has been received by the foreign government, or to publish correspondence with the foreign government without requesting its consent in advance.[1]

f. Privileges and immunities of diplomatic agents

By long custom, antedating perhaps all other rules of international law, the diplomatic agents sent by one state to another have been regarded as possessing a peculiarly sacred character, in consequence of which they have been accorded special privileges and immunities. The ancient Greeks regarded an attack upon the person of an ambassador as an offense of the gravest nature.[2] The writers of ancient Rome were unanimous in considering an injury to envoys as a deliberate infraction of the *jus gentium*.[3] Grotius wrote in 1625 that there were "two points with regard to ambassadors which are everywhere recognized as prescribed by the law of nations, first that they be admitted, and then that they be not violated."[4] The basis upon which this personal immunity rested was generally found in the principle that the ambassador personified the state or sovereign he represented. From this principle developed not only the custom of according special protection to the person of the ambassador, but also a comprehensive exemption from the local jurisdiction. In explanation of the privileges and immunities thus granted, writers worked out the fiction of *exterritoriality*, which held that the ambassador and his suite, together with his residence and the surrounding property, were legally outside the territory of the state.[5] This fiction obtained for a time a foothold in international law, and served the useful purpose, on the one hand, of explaining the actual immunities granted to foreign representatives, and, on the other hand, of emphasizing the sovereignty and equality of the several states. It was, however, open to the disadvantage not only of being a fiction, but of permitting inferences more comprehensive than the position of the ambassador called for. In consequence, it has been less referred

[1] Details may be found in Foster, *Practice of Diplomacy*, Chap. VI, and Satow, *op. cit.*, I, Chap. IX. By the rules applicable to public ministers must be judged the conduct of President Wilson in 1919 in making, in his public addresses in Italy, a direct appeal to the Italian people to support the policies to be advanced by him at the forthcoming conference at Paris.

[2] See Phillipson, *op. cit.*, I, 328 ff.

[3] *Ibid.*, 331.

[4] *De Jure Belli et Pacis* (Eng. trans.), Bk. II, Chap. XVIII, § III.

[5] Grotius concluded that "the common rule, that he who is in a foreign territory is subject to that territory, does, by the common consent of nations, suffer an exception in the case of ambassadors; as being, by a certain fiction, in the place of those who send them: and by a similar fiction they are, as it were, *extra territoriam;* and thus are not bound by the *Civil Law* of the People among whom they live." Whewell's trans., Bk. II, Chap. XVIII, § V.

to of recent years; and the immunities granted to public ministers are now generally explained as a mere exemption from the local law, based upon the necessity of securing to the minister the fullest freedom in the performance of his official duties.

Personal immunities

Since the personal inviolability of public ministers is more sacred than that of the ordinary citizens of the state, international law not only regards an affront offered to a public minister by the government of the foreign state as calling for prompt apology and redress, but requires that the local government prosecute with exceptional energy any assault upon the minister by private citizens.[1] In many states there are special municipal statutes providing for the punishment of offenses against public ministers. The laws of the United States impose a heavy penalty upon one who in any manner "offers violence to the person of a public minister, in violation of the law of nations."[2] Even the outbreak of war between two countries does not lessen the obligation of the local government in this respect. When the residence of the British ambassador in Berlin was attacked on August 4, 1914, not only did the local police act promptly to suppress the mob, but the secretary for foreign affairs sent assurances of profound regret. International law, however, does not guarantee protection to a public minister who, having committed the first assault, is assaulted in turn by the party attacked.[3] Nor does international law offer special protection to a minister who unnecessarily exposes himself to danger in time of riot or insurrection.

Exemption from criminal jurisdiction

In addition to enjoying special protection of their persons public ministers are completely immune from the criminal jurisdiction of the state. Under no circumstances may they be prosecuted for offenses against law and order. But while international law exempts them from criminal suit, it requires of them a voluntary obedience to the municipal law of the foreign state; so that it would be good ground for remonstrance, and even for a demand upon their government for their recall, if continued breaches of the law were committed. Should a public minister resort to personal vio-

[1] In the case of Respublica *v.* De Longchamps, 1 Dallas, 111 (1784), Scott, *Cases*, 295, in which the defendant was convicted for having threatened to assault the secretary of the French legation, the court said: "The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the Sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world."

[2] *Rev. Stat.*, § 4062.

[3] See the case of United States *v.* Ortega, 4 Wash. Circ. Ct., 531 (1825); Scott, *Cases*, 296, n.

CHAP. XXI

lence against another he may be restrained and, if necessary, temporarily imprisoned and expelled from the country. Likewise should he conspire against the safety of the state he may temporarily forfeit his personal freedom; but no further punishment, other than expulsion, may be inflicted upon him. The classic cases of conspiracy are those of Count Gyllenborg, the Swedish ambassador in London in 1717, who was arrested for complicity in a plot against George I, and of Prince Cellamare, the Spanish ambassador in Paris, who was arrested in 1718 for conspiring to overthrow the French regent.[1]

Exemption from civil jurisdiction

The exemption of public ministers from the civil jurisdiction of the country is complete in so far as is necessary to secure to them the fullest freedom in the performance of their official duties. They may not be sued for debt or other form of contract, or for torts of any kind.[2] In Great Britain a statute of 1708 imposes heavy penalties upon any person who "shall presume to sue forth or prosecute" any writ or process against a public minister.[3] The law was passed following the arrest for debt of the ambassador of Peter the Great and the demand of the latter for the drastic punishment of the offenders. In the United States a law of Congress declares any such judicial process null and void, and pronounces the person suing out the process to be "a violator of the Law of Nations, and a disturber of the public repose."[4] Wheaton's Case, in which the Prussian Government held that the exemption of a minister from suit did not protect his personal property from distraint where the contract of lease created that right on the part of the lessor, is regarded by commentators as an irregular precedent.[5] The exemption granted continues even to the time when, at the termination of his appointment, the minister is leaving the country and placing himself beyond the jurisdiction of the state over him as a private individual.

Business activities of a minister

The immunity of a public minister from suit is, however, held by some writers not to extend to business activities of the minister which have no connection with his official duties. Consequently it

[1] Snow, *Cases*, 87, 88; Satow, *op. cit.*, I, 254, 256.

[2] Grotius laid down the rule in positive terms: "For all compulsion ought to be removed from an ambassador; that which touches things necessary to him, as well as his person, that he may have full security." *De Jure Belli et Pacis* (Whewell's trans.), Bk. II, Chap. XVIII, § IX.

[3] For the text, see Scott, *Cases*, 1.

[4] *Rev. Stat.*, §§ 4063-4064.

[5] Moore, *Digest*, IV, § 663; Wheaton, *Elements of International Law*, ed. 1904, 341.

is asserted that if a public minister undertakes to hold real property other than his official residence, suit may be brought *in rem* against the property, or that if the minister acts as guardian or trustee he may be sued in that capacity, or that if he engages in private business or takes part in a commercial venture he may be sued in connection with the undertaking.[1] But while this doctrine has the approval of publicists as a sound principle, it does not accord with two leading British cases. In the case of Taylor *v.* Best [2] the court held that the secretary of the Belgian legation could not be sued for money deposited in his hands as one of the directors of a commercial company; but as he had voluntarily submitted himself to the jurisdiction of the court it was held that he could not later claim his official privilege. A similar decision, limited to the first point, was rendered in the case of Magdalena Steam Navigation Co. *v.* Martin,[3] in which the defendant minister of Guatemala and New Granada was sued for payments due on shares of the plaintiff company. In the Instructions to Diplomatic Officers, issued by the Department of State of the United States, it is said that "if a diplomatic representative holds, in a foreign country, real or personal property aside from that which pertains to him as minister, it is subject to the local laws." [4] The logical inconsistency of the existing usage is that a suit brought on ground of non-official business activities may hamper a minister quite as much as a suit for debt arising from personal relations with a tailor or grocer.

Further personal immunities of a public minister consist in his exemption from the service of subpœna as a witness in court, in his exemption from income and other personal taxes, and in the now obsolete right of private worship in his domestic chapel in cases where freedom of public worship is not permitted. In certain cases public ministers have voluntarily appeared in court as witnesses, as happened when Señor Comancho, minister from Venezuela to the United States, appeared as one of the chief witnesses at the trial of the murderer of President Garfield.[5] On the other hand, the refusal of the Dutch minister, Dubois, in 1856 to appear as a witness in a case of homicide was resented by the United States, and his recall was later asked for.[6]

[1] Oppenheim, *International Law*, I, § 391.
[2] 14 Common Bench, 487 (1854). Moore, *Digest*, IV, 657.
[3] 28 L. J. Q. B., 310 (1859). Snow, *Cases*, 102 n. 1; Cobbett, *Cases*, I, 294.
[4] § 47.
[5] Moore, *Digest*, IV, 644.
[6] *Ibid.*, 643.

CHAP. XXI

Immunity of official residence

The privileges conferred upon the public minister extend beyond his person to his official residence and to the members of his suite. The immunity of his official residence, or domicile, known as *franchise de l'hôtel*, was formerly much more comprehensive than at present, and included a right of asylum now no longer recognized.[1] At the present day the minister's domicile, including stables, outbuildings, carriages, and automobiles, may not be entered by the local police or other officers of justice or administration in the ordinary exercise of their duties. Should fugitives from justice seek asylum in the minister's residence, they must be delivered up by the minister upon request. Only under the most urgent circumstances may the embassy or legation be forcibly entered by the police in order to arrest the fugitive criminal. In the case of Gallatin's coachman the British police authorities arrested the offender within the stable of the embassy for an assault committed outside the embassy;[2] but writers have commonly regarded the action of the police in this case as contrary to established principles. In the case of Nikitchenkow in 1867, the French police were called in to arrest a Russian subject who had assaulted a member of the embassy within its precincts. The Russian ambassador demanded his extradition upon the ground that the offense had been committed upon Russian territory; but the French Government refused to comply.[3] Moreover, the immunity of the minister's residence does not warrant him in making of it a place of detention for political offenders who are subjects of the home state. In 1896 the British Government effectively interfered to secure the release of Sun Yat Sen, who had been persuaded to enter the Chinese embassy in order that he might be forcibly transported to China.[4]

Exemption from taxation

International law is not clear as to how far the immunity of the minister's residence includes an exemption from local taxation. It would appear that the rule of reciprocity is observed in respect to indirect taxes upon the land itself and upon the buildings on it; but the line between what is granted by courtesy and what is granted by established custom is not clearly marked off. In the case of Parkinson *v.* Potter[5] the court held that the attaché of the Portuguese embassy was entitled to immunity from the payment

[1] See above, p. 186.
[2] Satow, *op. cit.*, I, 295.
[3] Stowell and Munro, *Cases*, I, 228; Moore, *Digest*, II, 778, where the name is given as Nitchencoff.
[4] Oppenheim, *International Law*, I, § 390.
[5] L. R. 16 Q. B. Div., 152 (1885).

of local rates assessed upon a house he had rented. In the case of Macartney *v.* Garbutt [1] it was held that Macartney, having been accredited to Great Britain as secretary to the Chinese embassy in London, was, although a British subject, entitled to share in the exemption of public ministers from the payment of parochial rates. The concession, however, to public ministers of exemption from the payment of customs duties upon goods imported for their private use is still in the stage of comity rather than in that of established custom.

Immunities of a minister's retinue

The privileges and immunities granted to public ministers are extended in large part to the members of their retinue or suite. Those who are officially connected with the embassy or legation enjoy by old custom the same inviolability and personal exemptions as are enjoyed by the ambassador or minister himself. In the case of Heathfield *v.* Chilton [2] the court recognized that section of the law of 1708 [3] which included the servants of a public minister in the exemption from service of process as being equally part of the law of nations, but denied its application to the defendant as not actually being, as alleged, secretary to the minister of the bishop of Liège. Recent illustrations of the rule are to be seen in the cases of Parkinson *v.* Potter and Macartney *v.* Garbutt referred to in connection with a minister's exemption from taxation.[4] In the class with official members of the minister's suite are to be placed couriers or despatch-bearers, who not only must be granted immunity from local jurisdiction, but must be afforded special protection and facilities in the exercise of their duties. The immunities granted to persons in the private employment of the minister and his official suite are, however, subject to qualifications. If citizens of the foreign state, they remain amenable to its laws. Otherwise they are exempt from local jurisdiction, but their exemption may be waived by the minister at his discretion. In the case of Triquet *v.* Bath,[5] decided three years before Heathfield v. Chilton by the same court, a bill brought by the county against the defendant was set aside upon satisfactory evidence that he was a *bona fide* domestic servant of the Bavarian minister. The exceptional case of Gallatin's coachman has already been referred to.[6]

[1] L. R. 24 Q. B. Div., 368 (1890); Cobbett, *Cases*, I, 297.
[2] Court of King's Bench, 1767. 4 Burr, 2015. Scott, *Cases*, 288.
[3] See above, p. 362.
[4] See above, p. 364.
[5] 3 Burr., 1478 (1764). Scott, *Cases*, 2.
[6] Above, p. 364.

CHAP. XXI

A minister's relatives

The dependant relatives of a public minister, living with him under his roof, share in his exemption from civil and criminal jurisdiction. Oppenheim regards it as an obsolete precedent that Don Pantaleon Sa, a brother of the Portuguese ambassador in London and a member of his suite, was arrested, tried, and executed by order of Cromwell in 1653 for the murder of an English subject;[1] but Lawrence thinks that if he was simply a visitor at the embassy, as might appear, "he would not be protected by diplomatic immunity today any more than he was two hundred and forty years ago."[2] In the recent case in which Carlos Waddington, the son of the Chilean minister at Brussels, killed the secretary of the legation, the Belgian Government recognized his immunity from arrest, and would not even accept the waiver of privilege offered by the minister until it had been confirmed by the Chilean Government.[3] As part of the immunity of the minister from the local jurisdiction, it is an established rule that children born to him while holding his official position are regarded as born upon the territory of his home state, and are subject to its allegiance *jure soli*.[4]

g. Rights with respect to third states

It is an old rule, deduced from the general principle of the recognized necessity of diplomatic intercourse between states, that public ministers have a "right of innocent passage" through the territory of third states, whether their mission has not yet begun or has officially terminated. What shall be regarded as "innocent passage" is, however, left to the decision of the third state. In 1854 Soulé, United States minister to Spain, was detained at Calais by the French Government in order, as it said, to determine whether he intended going direct to Madrid via Paris or planned to stop off in Paris, in which latter case the privilege of transit would be denied him. The circumstances were that the minister, a naturalized American citizen born in France, had rendered himself on a previous occasion obnoxious to the French government.[5] Judicial opinion in the United States sanctions the exemption of a public minister from civil suit in the third state through which he is passing. In the case of Wilson *v.* Blanco[6] the state court of New

[1] *International Law*, I, § 404. [2] *Principles of International Law*, § 129.
[3] Oppenheim, *op. cit.*, I, § 404.
[4] The Fourteenth Amendment of the United States Constitution has this rule of international law in view when it provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."
[5] Moore, *Digest*, IV, § 643.
[6] 56 N. Y. Sup. Ct., 582 (1889); Scott, *Cases*, 206.

York held that the minister from Venezuela to France was not subject to its jurisdiction in respect to a civil claim, so that a judgment entered against him in default of appearance was vacated. The decision has been criticized by a British writer,[1] but it has the qualified support of the decision of the British court in the case of New Chili Gold Mining Co. *v.* Blanco,[2] in which it was held, with respect to the same defendant, that a writ might not be served outside England on the minister of a friendly power accredited to a foreign state.

Innocent passage in time of war

It is in time of war, however, that the question of innocent passage presents special difficulty. An old precedent shows the third state arresting a minister sent by its enemy to a neutral state. On his way from France to Berlin in 1744 Maréchal de Belle Isle passed through the territory of Hanover, then at war with France, and was made prisoner by that state.[3] But it is doubtful whether that case carries any weight at the present day. On November 28, 1916, the British Government refused a safe-conduct to Count Tarnowski, newly appointed ambassador of Austria-Hungary to the United States, awaiting passage from Holland, the reason alleged being the fact that the count's predecessor had been engaged in plots against the Allies. The United States asked a reconsideration of the decision, pointing out that it was an inalienable right of sovereign states to exchange ambassadors, and that third states, even in time of war, were not justified in denying that right. The safe-conduct was thereupon granted.[4]

Case of Mr. Washburne

International law is likewise not clear as to the rights of the diplomatic agents of a neutral state when the capital of the state to which they are accredited is occupied by the enemy. Their personal immunity in such case is clearly established, but it is doubtful whether they may claim any other privileges beyond the right to leave the country. In 1870, during the siege of Paris by the German troops, the American minister to France, Mr. Washburne, was refused permission to send a messenger with sealed despatches through the German lines to London. The United States protested, urging that the rights of legation "must be regarded as paramount

[1] Westlake, *International Law*, I, 2nd ed., 275, n.

[2] 4 T. L. R., 346 (1888); Cobbett, *Cases*, I, 308.

[3] Vattel commented favorably upon the case and formulated a general rule on the subject. *Droit des Gens* (Eng. trans.), Bk. IV, § 85.

[4] *New York Times*, November 29, 30, 1916. Garner, *International Law and the World War*, I, 33, n. Public discussion of the incident compared it with the case of the *Trent* (see below, p. 548), but the latter presented substantially different circumstances.

CHAP. XXI

to any belligerent right'' and should not be curtailed unless there was reason to believe that they would be abused, or unless some military necessity required it. The German Government finally made an exception in favor of the American minister in the form of a ''privilege'' of receiving closed despatches.[1] Hall, on the contrary, argues from general principles that there is no presumption in favor of the existence of an obligation on the part of the belligerent to grant more than personal inviolability;[2] and it would seem as if the weight of authority were on that side, there being no established custom.

h. Termination of a diplomatic mission

Diplomatic missions, whether embassies or legations, do not, like governments, possess a corporate character in consequence of which they continue their legal existence in spite of changes in the personality of the head of the mission. On the contrary, letters of credence are personal documents, completely so in respect to the minister appointed, and to a degree in respect to the sovereign to whom he is accredited. Hence a diplomatic mission comes to a formal end with the death of the minister, or with his recall by his home government, and a new letter of credence must be presented by his successor. On the other hand, there is no well established rule to determine what changes in the foreign government bring the mission to a similar formal end. The death of the foreign sovereign generally calls for new letters of credence, although the rule has lost its meaning with the establishment of constitutional monarchies. The death of a foreign president leaves the minister's position unchanged, as does obviously a mere change of the incumbent of the office.

Effect of revolution

A more difficult question, to which precedent gives no definite answer, is the effect of constitutional changes in the government of the foreign state. A revolution, such as that in Portugal in 1910, by which a constitutional monarchy is overthrown and a republic set up in its place, generally has the effect of suspending, not terminating, a diplomatic mission, until such time as the government of the home state decides whether it will recognize the new government. During this *ad interim* period the public minister continues to enjoy his diplomatic privileges and immunities, although he maintains no relations with the *de facto* government. The United States minister to Russia continued at his post after March, 1917, until his home government decided that it could not recognize the Bolshevik Government set up in November, 1917,

[1] Moore, *Digest*, IV, § 675.

[2] *International Law*, § 101.

when he was recalled. In like manner the overthrow of a government by violence, when the constitutional form of the state is left intact, leads to a suspension of diplomatic relations, which may result, as in the case of the Mexican Government after the overthrow of Carranza in 1920, in the actual termination of the mission by a refusal on the part of the minister's home government to recognize the *de facto* revolutionary government.[1] Great Britain refused for a period of more than two years beginning in 1904 to renew diplomatic relations with Serbia as a form of protest against the overthrow and murder of the Obrenovitch dynasty.[2]

Recall of offending minister

The general principle appears to be recognized that a state may for good and sufficient reason demand of a foreign government that it recall an individual minister who has rendered himself *persona non grata;* but the law is not clear as to what circumstances shall give rise to good and sufficient reason. Consequently the minister's home government may inquire into the facts, and if it finds them inadequate it may either refuse to recall the minister, or recall him and neglect to appoint a successor in his place. Should it decide not to recall him, it is open to the state to which he is accredited either to refuse to deal with him or to dismiss him from the country. Dismissal is an extreme measure, and as there is no law governing its justice or injustice in a given case it has more than once proved a cause of sharp friction between the two countries involved.

Circumstances justifying recall

The circumstances giving rise to a demand for the recall of a public minister have, as a rule, involved some interference on the part of the minister with the internal affairs of the country. The demand for the recall of the French minister, Genêt, in 1792, was granted without demur by the French Government, which declared that his "proceedings and criminal maneuvres" were not authorized by his instructions.[3] On its part, however, the French Government made the recall of Genêt the occasion for a demand for the recall of the American minister at Paris, Gouverneur Morris, who had taken part in plots for the escape of the imprisoned king.[4] The recall of the Russian minister, Catacazy, in 1871, who had indulged in personal criticism of President Grant, was demanded on the ground that his conduct was such as "materially to impair his usefulness to his own government and to render intercourse with him, for either business or social purposes, highly disagree-

[1] See above, p. 114.
[2] See above, p. 113.
[3] Moore, *Digest,* IV, § 639, p. 485.
[4] *Ibid.,* p. 572.

CHAP. XXI

able."[1] In 1898, shortly before the outbreak of the Spanish-American War, the recall of the Spanish minister at Washington, de Lome, was asked for in consequence of the theft and publication of a private letter in which he had criticized President McKinley.[2] The most recent case is that of the Austro-Hungarian ambassador Dumba, whose recall was demanded by the United States on September 9, 1915, on the ground of the "admitted purpose and intent of Mr. Dumba to cripple legitimate industries of the people of the United States and to interrupt their legitimate trade, and by reason of the flagrant violation of diplomatic propriety in employing an American citizen protected by an American passport as a secret bearer of official dispatches through the lines of the enemy of Austria-Hungary."[3] On December 4, 1915, the Department of State informed the German Government that the continued presence of Captain Boy-Ed, naval attaché, and Captain von Papen, military attaché, was no longer desired.[4] It should be observed that an entirely different situation is presented when the recall of a minister is demanded, as in the case of the American minister to Brazil, Mr. Wise, in 1847, because of acts done by him under instructions from his government.[5] To accede to a demand for recall under such circumstances would be equivalent to a repudiation by the minister's government of its own conduct. The foreign government has only the choice of retaining or dismissing him.

Dismissal of diplomatic agent

The extreme step of dismissing a public minister, or of refusing further to deal with him when the demand for his recall has not been promptly complied with, has been taken on several occasions by the United States upon grounds the adequacy of which has been much debated. In the early case, in 1806, of the Spanish minister Yrujo, who had been guilty of intemperate public utterances, the United States refused further dealings with him when his government failed to recall him upon request; but it allowed him to remain in the country.[6] In the case of the British minister Jackson in 1809, who had insinuated that the Government of the United States had been guilty of duplicity in its negotiations with his predecessor, the Department of State refused forthwith to deal further with him; and he was subsequently recalled by his government.[7] In 1856, when the British Government refused to recall its

[1] Moore, *Digest*, IV, § 639, p. 501.
[2] *Ibid.*, p. 507.
[3] *Am. White Book, European War*, No. 3, p. 321.
[4] *Ibid.*, p. 325.
[5] For the facts of the case, see Moore, *Digest*, IV, 495.
[6] *Ibid.*, § 640.
[7] *Ibid.*

minister, Crampton, on the ground that the charges that he had violated the neutrality laws of the United States were unfounded, the Department of State announced the determination of the President to "discontinue further intercourse" with him.[1] The dismissal of the British minister, Lord Sackville, by the United States in 1888, following a refusal of his government to recall him, has met with general disapproval by writers on international law. His offense, while technically serious, was committed under circumstances which would doubtless have exonerated him had political conditions not called for his sacrifice.[2]

Breach of diplomatic relations

International law has no definite rules covering the circumstances under which a breach of diplomatic relations is justified. Where the breach is due to a revolutionary change in the government of the state to which the public minister is accredited, it generally takes the less conspicuous form of a failure to renew the credentials of the minister accredited to the previous government. The question is then subordinated to the decision of the minister's state to recognize the new *de facto* government. The breach of diplomatic relations between Great Britain and Serbia following the dynastic changes of 1904 lasted for more than two years.[3] The breach of diplomatic relations between the United States and Mexico following the overthrow of the Carranza régime lasted three years.[4] Where the breach is peremptory, it marks both the indignation of the offended party and its unwillingness to discuss further the points at issue, as in the case of the rupture of diplomatic intercourse between the United States and Germany on February 3, 1917, following the renewal by Germany of the submarine attacks upon neutral merchant ships. Whether war shall follow the breach of relations is a matter for the decision of the offended party.

i. The consular service: origins

While the status and functions of consular agents, as at present recognized, are of modern origin, the roots of the consular system extend far back beyond the establishment of permanent embassies. The Greek city-states developed an inchoate consular service differing from the modern system in that the consuls were citizens of the foreign state instead of the state whose interests they protected, but resembling the modern system in a number of other respects.[5]

[1] *Ibid.*
[2] *Ibid.*, 536-548. Satow, *op. cit.*, I, 397.
[3] See above, p. 113.
[4] See above, p. 114.
[5] See Phillipson, *International Law and Custom of Ancient Greece and Rome*, I, Chap. VI.

CHAP. XXI

During the Middle Ages the practice grew up among the coast cities of the Mediterranean of appointing "maritime consuls," whose function it was to decide in their home ports disputes growing out of sea trade, and who were in time led to go to foreign ports and set up a temporary residence there. On the other hand, at perhaps an even earlier period, the custom arose among the foreign merchants of maritime cities of electing one of their group to act as judge of their commercial disputes. In time these two sets of judges were fused, and states came not only to send out consuls to foreign countries, but to enter into treaties stipulating the protection to be afforded them and the functions they were to be permitted to perform. With the establishment of permanent embassies in the seventeenth century the functions of consuls were greatly reduced; and at the same time the strengthening of the conception of national sovereignty led to a refusal, except in Mohammedan countries, to permit them any longer to exercise civil and criminal jurisdiction over their countrymen.[1]

Legal status of consuls

Unlike diplomatic agents, consuls are not representatives of their state as such, but are merely custodians of such of their state's domestic interests as the latter has seen fit to confer upon them. Fundamentally, therefore, their status is not an international but a national one. But inasmuch as they are appointed by their state, and are recognized by the foreign state in which they reside as possessing an official character, and are permitted in that guise to perform certain functions otherwise belonging to officials of the foreign state, it follows that they have a limited international status, and are governed and protected by definite, if somewhat restricted, rules. In certain exceptional cases, principally in non-Christian states, exclusive of Japan, consuls retain their earlier civil and criminal jurisdiction.[2] Moreover, in some small states they occasionally exercise both consular and diplomatic functions, being authorized in such case by two separate documents. For the most part, the character and functions of consuls are regulated by separate treaties between their home state and the several states to which they are sent.[3] But as in the course of time the provisions of these treaties have come to be more or less uniform and conven-

[1] For a brief outline of the development of the modern consular system, see Potter, *Introduction to International Organization*, Chap. V.

[2] See above, p. 188.

[3] For the text of the recent consular treaty with Sweden, see Charles, *Treaties*, 112.

tional, it may be said that the status of consuls is now in many respects part of international customary law.[1]

Grades of consuls

Since they have no representative character, international law does not concern itself with the various grades of consuls. Hence the questions of rank and precedence which have been raised with respect to public ministers do not concern consuls. As a matter of domestic administration, however, most large states adopt a classification which distinguishes between consuls-general (having supervision over a larger area), consuls, vice-consuls, and consular agents. One distinction, however, which has obtained some recognition at international law is that between *consuls missi,* or professional consuls sent out by their government for the express purpose of attending to its interests, and forbidden as a rule to engage in any other business, and *consuls electi,* chosen by the state from among merchants resident in the foreign country and not necessarily citizens of the state they represent. The latter, when appointed at all, are of inferior rank; and they do not enjoy all of the privileges and immunities conceded to the former.

Appointment and authorization of consuls

While in legal theory states are not obliged to admit consuls from other states, as a practical matter the interchange of these agents has become so essential to mutual intercourse between states that no state could refuse to receive them without cutting itself off from the community of nations. However, as in the case of diplomatic agents, a state may refuse to admit a particular individual whose conduct has given ground for belief that his presence in the country would be undesirable. No reasons need be assigned for so doing. In 1869 Great Britain refused to admit Major Haggerty, a naturalized American of Irish descent, because of his alleged connection with Fenian plots.[2] The admittance of a consul is accomplished by the presentation on his part of a patent or commission, in return for which he is furnished by the foreign state with an exequatur, which recognizes him as an official of his government and authorizes him to exercise the functions appropriate to his office. Should the conduct of the consul become obnoxious to the foreign state, it may request his home government

[1] The student will observe, as in the instance of extradition treaties, that while bilateral compacts do not, in respect to their substance, come under international law, yet the conclusion of such agreements by practically all the states acting two by two approximates to the adoption of a single agreement by the whole body collectively. See above, p. 64.

[2] Hall, *International Law,* § 105.

to recall him; or if the matter be serious, it may forthwith withdraw his exequatur and thus leave him without authority to continue his functions. In 1856 the United States withdrew the exequaturs of three British consuls because of their alleged activities in recruiting men for the British army in the Crimea.[1] In 1861 Great Britain conceded the right of the United States to withdraw the exequatur of the British consul at Charleston, although in so doing it expressed the opinion that the authority had been exercised without sufficient grounds.[2]

Functions of consuls

While the various functions of consuls are primarily determined by the municipal law of the state appointing them, the exercise of many of their functions encroaches upon the jurisdiction of the local government and to that extent requires its consent. This consent is regularly given in the form of consular treaties or conventions, which specify the rights consuls are to enjoy and the functions they are to perform in the two countries respectively. The more important of these mutually recognized functions, now so generally provided for as to have become part of customary international law,[3] relate to the merchant marine of the consul's home state and to the settlement of the property of deceased persons. A typical consular convention, such as that between the United States and Sweden on June 1, 1910,[4] provides that the respective consuls shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise between captains and their crews, except in cases where the differences are of a nature to disturb the peace of the port.[5] They shall also have authority to arrest deserters from the vessels of their nation, shall settle damages suffered at sea by such vessels, and shall superintend proceedings relative to the salvage of vessels. The notarial powers of consuls consist in receiving the depositions of the captains and crews of vessels of their own country, and in authenticating deeds and testamentary dispositions of their countrymen. They may also appear personally on behalf of the absent heirs or creditors of deceased citizens of their own state. In addition to these functions, expressly stipulated in treaties, consuls are intrusted with numerous duties relating to the commerce of their country with the foreign state, such as the legalizing of ship's papers, the inspection of invoices, and the collection of information regarding

[1] Hall, *International Law*, § 105. [2] Moore, *Digest*, V, § 700.
[3] See above, p. 61. [4] Charles, *Treaties*, 112. [5] See above, p. 193.

conditions of trade and industry, as well as with the protection of citizens of their home country when in distress. For these latter duties, however, no special authorization of the foreign state is required, and they are governed by domestic law only.

Privileges and immunities of consuls

The long-established privileges and immunities conceded by states to foreign diplomatic agents are not enjoyed by consuls in like degree, there being no representative character attaching to their persons. Nevertheless, since consuls are public officers of their states and are custodians of its material interests, it has been customary for the state in which they perform their functions to afford special protection to them, and to regard their consular offices and archives as possessing a certain degree of inviolability. An attack upon a consulate by a mob in time of riot and disorder is regarded as a serious affront to the state whose arms and national flag are displayed upon the building, and redress is demanded much as if the consul were a diplomatic agent. In 1919 when the American consular agent, Jenkins, was kidnapped by bandits in Mexico, the Department of State advised the Mexican Government that the United States expected that measures would be taken to obtain the release of Jenkins even if it should become necessary to pay the ransom demanded.[1] In addition to these somewhat vague customary privileges and immunities, numerous others have been stipulated for in consular treaties and conventions; but they possess as yet too little uniformity to admit of the formulation of a definite law. The result is that there are wide variations in the practice of the several states.[2]

Amenability to criminal jurisdiction

As a general rule, consuls are subject to the civil and criminal jurisdiction of the foreign state. In respect to civil suit it was held in Barbuit's Case[3] that a commercial agent of the king of Prussia in Great Britain was not entitled to the privileges of *jus gentium* belonging to ambassadors, and was therefore not protected from civil suit by the municipal law, which the court held to be "only declaratory of the ancient universal *jus gentium.*" In the case of Viveash *v.* Becker,[4] decided in 1814, the British court refused to exempt a consul to the duke of Oldenburg from the necessity of giving bail bond when arrested for debt, the same

[1] For details, see Hyde, *International Law*, I, 504, n.

[2] Compare the non-committal political decision given by the arbitration court in the Casablanca case between France and Germany in 1909. Scott, *Hague Court Reports*, 110. Wilson, *Hague Arbitration Cases*, 82.

[3] Buvot *v.* Barbuit, High Court of Chancery, 1737. Scott, *Cases*, 311; Stowell and Munro, *Cases*, 119; Evans, 326.

[4] 3 M. & S., 284; Cobbett, *Cases*, I, 309.

CHAP. XXI

distinction being adverted to between consuls and public ministers as was made in Barbuit's Case. In 1889 it was held by the Supreme Court of the United States, *in re* Baiz,[1] that a consul-general of Guatemala, who alleged that he was exercising the functions of a diplomatic officer, was not a public minister within the intent of statutes of the United States, and could claim no exemption from civil suit.

The general rule of the amenability of consuls to criminal jurisdiction is sometimes modified to the extent of exempting them from prosecution for minor offenses, and of taking more moderate action in other cases. In 1868 the United States pressed for a heavy indemnity from Peru for alleged illegal (in point of local law) and hasty procedure in the arrest of Consul Weile for participation in an assault.[2] In the Pritchard Affair, occurring on the island of Tahiti in 1844, France apologized to Great Britain for the seizure and deportation of a British consul for alleged instigation of the natives to revolt.[3] When, however, a consul is guilty of grave offenses he is subjected to regular criminal prosecution and punished according to the law, as in the case of the German consul-general at San Francisco, Franz Bopp, who was convicted on January 10, 1917, of conspiring to destroy munitions and sentenced to fine and imprisonment. The vice-consul and a consular attaché were given life sentences.[4]

Liability to taxation

It is common to exempt consuls from direct personal taxes, such as income taxes and taxes upon other personal property, but to subject them to the usual taxes upon real property and upon the private business in which they may happen to be engaged. The subject is governed by treaty stipulations, which have now become sufficiently common and uniform to approximate to a general rule. In a case relating to the consul of the elector of Hesse the United States Department of State in 1856 announced the doctrine that consuls, provided they were not citizens of the United States, were "exempted from all public service, and from all taxes, imposts and contributions except such as they may have to pay on their property, or in consequence of their engaging in commercial pursuits."[5] It is also common to exempt consuls from the obligation of appearing in person as witnesses in court. Where necessary, the

[1] 135 U. S., 403 (1890). Scott, *Cases*, 314; Evans, 328.
[2] Stowell and Munro, *Cases*, I, 22.
[3] *Ibid.*
[4] *New York Times*, January 11, 1917.
[5] Moore, *Digest*, V, § 715.

consul's evidence may be taken in the form of a deposition at the consulate. In Dillon's Case [1] a conflict arose between a provision of the French-American treaty of 1853, giving to the respective consuls immunity from appearance as witnesses before the courts, and the provision of the United States Constitution giving to accused persons the right to be confronted with witnesses in open court. The result of controversy was, on the one hand, an apology on the part the United States for its action in compelling the attendance of the consul in court, and, on the other hand, an unwillingness on its part to conclude treaties in the future exempting consuls from the duty of giving testimony.

Proposals of the Institute of International Law

The subject of consular immunities received constructive treatment at the hands of the Institute of International Law at its session at Vienna in 1896, when a series of rules, arranged in codified form, was adopted.[2] The rules distinguish between professional consuls and consular agents, specify the conditions under which consuls shall enjoy a large measure of personal immunity, and restrict the immunities to be enjoyed by consular agents. While consuls are left amenable in general to the local civil and criminal jurisdiction, an exception is made in the case of acts performed in their official capacity and within the limits of their powers. Their official residence, together with the premises occupied by their office and archives, are made inviolable; they are excused from specified personal taxes; and they are permitted to correspond with their government by telegraphic despatches in cipher.

Special status of consuls in the Orient

The function of exercising civil and criminal jurisdiction over their countrymen assigned to consuls in the Mohammedan countries of the Mediterranean during the fourteenth and fifteenth centuries continued to be exercised by them in those parts, after having been taken from them in European countries. Treaties known as "capitulations" were entered into from time to time, extending the system to other non-Christian countries, and also enlarging the jurisdiction of the consuls and conferring upon them many of the privileges and immunities belonging to diplomatic agents. In consequence of the differences between the European and the Oriental systems of law, the right was secured by the leading powers to have their consuls exercise jurisdiction not only over cases between citizens of their own country, but over *mixed cases* between

[1] *Ibid.*, § 714. Stowell and Munro, *Cases*, I, 31.
[2] *Resolutions*, 123.

such citizens and natives of the non-Christian state.[1] The provisions of these treaties, being the result of special contractual agreements, form, as such, no part of international law; but the encroachment which they mark upon the independence of the Oriental state is of legal interest as an exception to the general rule of internal sovereignty.[2]

[1] For the special system of "international courts" established in Egypt in 1875 for the decision of mixed cases, see above, p. 189.

[2] See above, p. 164.

CHAPTER XXII

REMEDIAL RIGHTS

a. Remedial rights as distinct from antecedent

The rules of international law under discussion thus far have dealt with what may be called in the terminology of general jurisprudence the "antecedent" or "primary" rights of states; that is to say, those rights which deal with acts or objects which are due to the possessor of the right for their own sake. They are rights which represent the enjoyment on the part of the possessor of certain positive advantages, or of a certain power or control over his own acts and those of others and over particular material objects. Accompanying these antecedent or primary rights are what may be called, in the same terminology of general jurisprudence, "remedial" rights, or rights recognized by the law as entitling their possessor to use due and proper means to enforce his antecedent rights or to obtain redress in case of their violation.[1] *Ubi jus, ibi remedium.* Where there is a right there is likewise a remedy. Whether the remedies offered by the law are in all cases practically effective would seem to be a question distinct from the recognition of the rights themselves. In the municipal law of modern democratic states remedial rights adequately supplement on the whole the rights they are intended to protect, although failing on occasion to do so. By contrast, international law, being deficient in the judicial and executive agencies which are the sanction of municipal law, offers remedies which, while effective to secure the enjoyment of rights under normal circumstances, break down at times under stress of arbitrary conduct by one or more of the stronger powers.

Remedial rights under municipal law

A fundamental characteristic of municipal law is that in consequence of the establishment of agencies defining the rights of individual citizens and providing means for their enforcement, any recourse to self-help is, excepting only the urgent case of

[1] See Holland, *Elements of Jurisprudence,* 8th ed., p. 130. The newer terminology introduced by Hohfeld and others, while logically superior to the older terminology here used, is not yet sufficiently well established in municipal jurisprudence to offer a satisfactory basis for analogies to be drawn from it. See above, p. 43, n. 1.

CHAP. XXII

defense against attack, absolutely denied to the injured party. Such redress as may be obtained must be sought through the courts set up by the state for the express purpose of adjusting conflicts of individual rights. On occasion it is possible for the citizen to obtain in advance an injunction to prevent the commission of threatened wrongs for which pecuniary redress would be inadequate. But whether the remedy anticipate or follow the wrong done, the citizen is forbidden to take the law in his own hands. Violence is an offense against the law, irrespective of the justice of the cause in which it is employed. Municipal law does, indeed, draw a distinction between crime and tort, between the more serious wrongs which the state is directly interested in punishing and for which it undertakes therefore to prosecute the offender in its own name, and lesser wrongs for the redress of which the injured individual is left to his own initiative to institute a suit in court for pecuniary damages. In both cases, however, the law requires that, apart from immediate self-defense, redress be obtained through the established agencies of justice. If punishment is to be meted out for the offense it must be meted out by the state; the individual can secure compensation for his loss only through the mediation of, and to the extent to which such loss is estimated by, the judicial tribunals constituted by the community.

Absence of international agencies of redress

By contrast with the organization of the modern state, the international community is lacking in agencies for the complete definition of international rights, and for the enforcement even of such rights as are clearly recognized by the law. In the first place the scope of the rules of international law is so limited within certain fields that many of the wrongs alleged to have been committed by one state against another do not fall within the category of legal offenses. Political offenses, as distinct from legal, are wrongs committed by one state against another in matters in regard to which there is no clear rule as to the respective rights of the parties.[1] Such offenses include, moreover, practically all those of a serious character which are regarded by the parties as involving vital national interests, and which are the actual causes of war.[2] The distinction of municipal law between crime and tort does not hold in international law.[3] No matter what the offense, the inter-

[1] See above, p. 129, n. 3. [2] See above, p. 128.

[3] It should be observed that the term "international crimes," frequently used in the text-books, refers not to acts of a state, but to acts of individual citizens, such as piracy and the slave trade, which have been condemned by the nations collectively and which may be punished by any one of them if the

national community accepts no direct responsibility for the maintenance of law and order through the punishment of the offender. Neither is it competent to prevent wrongs in advance of commission, upon the appeal of a state whose rights are threatened by another.[1] Nor is there a court of compulsory jurisdiction before which the injured state may bring suit in its own name to obtain redress for the wrong alleged to have been done it. To some extent the last two conditions have been modified by the adoption of the Covenant of the League of Nations, which creates a qualified and limited collective responsibility of the League as a body for the maintenance of law,[2] and provides that any war or threat of war shall be a matter of concern to the whole League, and that the League shall take any action that may be deemed wise and effective to safeguard the general peace. In regard to injuries already inflicted, the Covenant undertakes to lay down the first principles of a right of action to obtain redress by providing that disputes not submitted to arbitration shall be submitted to the Council, or, failing settlement by the Council, to the Assembly of the League.[3]

b. The right of self-help

Subject to the restrictions noted above with respect to the obligations assumed by the member states under the Covenant of the League of Nations, international law recognizes the right of self-help on the part of individual states as a sanction for the protection of alleged rights. Failing to obtain redress upon demand, each state may take the law into its own hands and prosecute the offender in its own name and in its own interest. In so doing it may or may not have the support of the public opinion of the international community; and consequently it runs the risk that if its action be too arbitrary not only will it incur ill repute, but the community, or certain more powerful members of it, may intervene in behalf of the state against which force is being exercised. But subject to this unreliable sanction, the effectiveness of

offenders, of whatever nationality, should fall into its hands. (See above, p. 204.) In like manner, "crimes against the law of nations" refer not to acts of a state, but to acts of individuals in violation of municipal laws enacted by a state for the prevention of acts within its territory for which the state might incur international responsibility. (See below, p. 390.) For a suggestion as to the desirability of an international agreement designating a limited group of injuries to individuals as international torts, see J. S. Wise, "Tort at International Law," *Am. Journal*, XVII (1923), 245.

[1] A limited form of process by injunction is provided for by the treaty of arbitration between the United States and France of September 15, 1914. (See below, p. 416, n. 5.) The same process was incorporated into the Draft Convention for the Permanent Court of International Justice, but was eliminated from the final statute.

[2] See above, p. 48.

[3] See below, p. 417.

CHAP. XXII

which can only be forecasted as a possibility,[1] the individual state is authorized to seek its remedy for itself, by such means as it may have at its command, and on such occasion as it believes it to be expedient to take action.

Restraints upon self-help

Since the right of self-help may, when more moderate measures have failed to secure satisfaction for the wrong done, take the form of war upon the offending party, international law has come to include a number of restraints upon the application of so drastic a remedy. In the first place, international law recognizes that not all offenses are of sufficient gravity to warrant a resort to force to redress them. This principle would appear to be accepted in general terms, quite apart from the practical issue as to whether the injured state finds it expedient to adopt such formidable measures where minor interests only are at stake. Setting aside offenses against international comity,[2] which cannot be considered as legal wrongs, custom has worked out a rough discrimination between lesser wrongs, for which an apology or an indemnity is an adequate remedy, and graver wrongs which may be redressed, if necessary, by a resort to war.[3] In the former class are such wrongs as a breach of unimportant treaty obligations, insults offered to diplomatic agents, and injuries inflicted upon aliens. In the latter class are such wrongs as arise out of the conflict of national policies, where the safety of the state is alleged to be at stake.

Gravity of particular wrongs

The decision as to the class within which a particular dispute falls rests, however, with the individual state. Writers of the eighteenth century drew a distinction between "perfect" and "imperfect" rights, the former being such as carried with them the right of compelling the fulfilment of the corresponding obligations, and the latter being such as did not warrant compulsion.[4] The distinction later gave way to that between fundamental and secondary rights, which omitted direct reference to the right of

[1] The ineffectiveness under existing conditions of the sanction of public opinion and of possible intervention is the uncertainty of its operation. Violence is not forbidden between states, as it is forbidden to citizens under municipal law. It is only violence without "just cause" that is illegal; and upon the question of just cause public opinion has often been able to express itself only after the war has been begun. The real effectiveness of public opinion as a sanction could only be tested by the adoption of a general agreement not to resort to war over a dispute until after a period for investigation of the facts and discussion of the law. See below, p. 416.

[2] See above, p. 35.

[3] Compare the distinction between fundamental and secondary rights, above, pp. 127-128.

[4] See, for example, Vattel, *Droit des Gens* (Eng. trans.), Introduction, § 17.

compulsion, but implied a justification of all effective measures of self-help. Neither distinction, however, succeeded in drawing an exact line between the two groups of rights, so that both fell short of a rule of positive law. Further, it should be observed that owing to the lack of an international executive agency for the protection of the fundamental rights of existence and of independence, states have been led to regard as grave many wrongs which in a community organized for mutual protection might be regarded as of little or no consequence. Hence what would be regarded by one state as a serious injury might be regarded by another state, or by the same state under different conditions, as sufficiently trivial to make a determined demand for redress seem inexpedient. The dispute, for example, between France and Germany in 1870 over the succession to the throne of Spain could doubtless not have formed even a pretext for war, had the international community been organized on a basis of collective responsibility for the maintenance of peace instead of on the basis of alliances and counter-alliances.[1]

Just causes of war

The principle that the right of self-help, in the extreme form of war, may not be resorted to for the redress of all wrongs indiscriminately has more often been discussed in connection with the question of the "just causes of war." Publicists both before and after Grotius attempted to lay down general rules defining the wrongs which might properly be regarded as just causes of war.[2] National defense was an obvious ground of war; but it proved difficult to draw the line between defense which took the form of anticipation of attack and an act of aggression itself.[3] Defense of property was a further justifying ground of war; but in the absence of a method of determining the just titles of property it was impossible to distinguish the defense of what was one's own

[1] See above, p. 46.

[2] Grotius compared the sources of war to the sources of actions at law, but the elaborate analogies which he worked out between private and public law advanced the question little beyond the stage of general principles. "Most writers," he said, "state three just causes of war: defense, recovery of property, and punishment of wrong." (*De Jure Belli et Pacis* (Eng. trans.), Bk. II, Chap. I, § II.) Vattel elaborated upon the same general principles: "We may say, therefore, in general, that the foundation or cause of every just war is an injury, either already received or threatened." His practical analysis of this generalization, however, together with the distinction which he introduced between perfect and imperfect rights (see above, p. 129), left numerous loopholes for evasion. *Droit des Gens* (Eng. trans.), Bk. III, § 26.

[3] A modern instance might be found in the declaration of war against Russia by Japan in 1904.

CHAP. XXII

from the taking of what was one's neighbor's.[1] As long as there was no collective judgment of the international community taking precedence of the judgment of the individual claimant, it was impossible to reduce the problem to terms of positive law. The general principle was accepted that a nation must not go to war except for just causes; but the application of the principle to the concrete case did not get beyond the province of international morality or ethics. Each state determined for itself whether its national interests made it expedient to take action. There remained the sanction of general public opinion to see that a state should not be wholly arbitrary in its application of principle to fact. But the ineffectiveness of the sanction of public opinion, with its post-factum condemnation of acts which it was powerless to undo, left the general principle practically valueless. International practice kept to the pragmatic rule that certain rights were not worth fighting for, and therefore should not be fought for, and that other rights might be fought for according to the chance of success in the particular case.[2]

c. Pacific measures of redress

In addition to the principle that not all offenses are of sufficient gravity to warrant a resort to force to redress them, international law prescribes that self-help must not take the extreme form of war until more moderate measures have been taken to obtain redress. Negotiation must regularly precede the appeal to arms. The intermediation of third states which undertake to offer their good offices must be given at least a respectful attention. An offer of arbitration must not be refused without at least an alleged belief that the dispute could not be satisfactorily settled by such procedure. Members of the League of Nations must not go to war against a state which complies with the recommendations set forth in a report, to which the Council has given its unanimous consent, or the Assembly a majority consent supporting the Council. The limited and qualified character of these peaceful methods of seeking redress will be considered more in detail in connection with the law of procedure.[3] It need only be observed here, as was

[1] For example, the campaign cry of 1844, "Fifty-four forty or fight," had it resulted in war, would have given voice on both sides to a popular conviction of just defense of property rights. Again, the declaration of war against Mexico in 1846 was based upon alleged defense of national property.

[2] "The question of the justice or injustice of war," says the Swiss publicist Rivier, "stated as a general and abstract proposition, although much debated in earlier times, is of little practical importance and is impossible of solution. The question can only be put in the concrete with reference to a particular war; and even then the answer will be far from clear." Quoted by Bonfils, *Droit International*, § 1002.

[3] See below, Chap. XXIV.

pointed out in connection with the just grounds of war, that these restrictions upon the right of self-help are an actual restraint only in so far as the customary sanction of public opinion, or the newer sanctions of the League of Nations, influence an individual state to be governed by them.

d. Form of redress

The decision as to what form the redress sought by a state shall take rests with the state itself, subject to customary restrictions similar to those mentioned above. Redress for minor offenses [1] generally takes the form of an apology for the wrong done, accompanied by compensation for the losses incurred in consequence of the wrongful act. More serious wrongs, especially those of a political character, can as a rule only be redressed by conceding the object demanded, or by undoing the conditions that have given rise to them. The distinction of municipal law between a suit *in rem* and a suit *in personam* [2] is applicable in international law only in so far as a state decides, of its own volition, to accept compensation in lieu of the object which forms the ground of dispute. As a matter of fact, pecuniary damages have rarely been regarded as adequate redress for wrongs arising out of the clash of national policies.

[1] Meaning, offenses that are regarded as minor by the injured party. See above, p. 382.

[2] That is, a suit to recover the object of the dispute and a suit to recover damages for wrongful conduct.

CHAPTER XXIII

THE RESPONSIBILITY OF INTERNATIONAL PERSONS

a. Limitations of state responsibility

In disputes between states concerning the violation of international rights, whether as the result of positive acts or of the failure to fulfil obligations, the issue is frequently raised as to the responsibility of the state for an act done in its name or perpetrated upon its territory.[1] Because of the corporate personality of states,[2] the inference as to responsibility from the act to the agent cannot always be direct as in the case of the acts of individuals under municipal law. Officers of the government hold their position by virtue of the express or implied consent of the citizen body. Not only, however, does this authority not imply an actual acquiescence on the part of the citizen body in each and every act of the officers of government, but in the case of subordinate officers it does not even imply a logical or presumptive acquiescence where the act of the subordinate is in violation of the instructions of a higher officer, or is contrary to the intent and purpose of the higher officer. Moreover, it frequently happens that individual citizens or groups of citizens commit acts injurious to foreign states or to their citizens, which in no way represent the will of the community as a whole. These facts of the domestic organization of the state have been taken into account in part by international law, and more or less definite rules have been developed to meet the claims brought by one state against another on the ground of injuries directly received or obligations unfulfilled.[3]

[1] The responsibility of a state in the sense here taken, i.e., the obligation of a state to stand personally for what is done by its agents or for certain acts committed upon its territory, must be distinguished from the obligations, general and particular, of the state toward aliens. The latter have been separately treated above, p. 156. The confusion between the two sets of obligations has been the result of the convenient practice of treating all claims against states under one heading; whereas claims arising out of governmental contracts are based upon a different principle from claims arising out of torts committed by state officers or by insurgent or riotous elements of the population. The former raise no question of responsibility, but only of methods of enforcing an admittedly valid agreement; the latter raise a question as to the existence of any obligation at all.

[2] See above, p. 84.

[3] The student may compare in a general way the rules governing criminal intent under municipal law.

b. States directly responsible for acts of their governments

International law holds states directly responsible for acts committed in the name of the state by the head of the government, or by agents acting under orders from the head of the government or acting with its sanction and approval. No account is taken of the fact that the head of the government may not actually represent, in respect of the particular act, the wishes of the citizen body. As in municipal law, so in international law, the will of the community is legally identified with the act of the officer exercising authority in accordance with constitutional law. In the case of President Huerta of Mexico in 1914 this rule was applied by the United States even to a *de facto* officer who had not been recognized by the United States as holding office *de jure*.[1] An exception is to be noted when the head of the state acts in the capacity of a private citizen, in which case, when satisfactory explanations have been made, his act is judged on the same basis as that of any other citizen. The acts of subordinate officers committed under direct orders from the head of the government are considered, in respect to responsibility, as acts of the head of the government itself. Under modern constitutional governments the head of the government is understood to be that branch in which is vested the executive power of the government and the duty of representing the state and conducting negotiations with foreign powers. In certain instances foreign governments have refused to accept the voice of the *de facto* head of the state as a true expression of the will of the people; but in so doing they have acted upon grounds of expediency and subordinated legal claims to practical considerations. In all cases, however, it is open to a state to show that the act of its officer was not intended to produce the results acually produced by it; in which case the offense is reduced in gravity accordingly, being classed with unauthorized acts for which apology and redress may be an adequate remedy. Where the offense is intended, a demand for redress on the part of the injured state would be beside the point.

Acts of subordinate officers

A state is also directly responsible for acts of subordinate administrative officers of the government when acting under general orders governing the particular class to which they belong. Ambassadors and other public ministers, military and naval officers, are, using the terminology of municipal law, "general agents" of the state; and so long as they act within the scope of the powers belonging to their office they create a responsibility on the part

[1] See above, p. 114.

CHAP. XXIII

of the state itself. It rarely happens, however, that acts done in pursuance of such general instructions give rise to an offense against a foreign state, and in any case it is open to the head of the state to show that the offense committed was not intended by the instructions issued. Numerous cases have arisen in which demands for redress on the part of an injured state have been met by a demonstration by the other party that the act of its agent was either in excess of instructions or based upon a wrong interpretation of instructions, or, again, a mere mistake resulting from lack of adequate information. Thus the commanding general at the port of Tampico promptly disavowed the act of the subaltern who arrested a detachment from an American warship in April, 1914, and the *de facto* Mexican Government supported his disavowal by a further disavowal of its own.[1] The same procedure was followed by the Japanese Government in the case of the death of Lieutenant Langdon at the hands of a Japanese sentry at Vladivostok in January, 1921.[2] When, however, the act of the administrative officer is done under specific orders from the head of the government, it becomes, as has been said, the act of the government itself. Further, it may happen that the act, when originally committed, was unauthorized; yet the state may subsequently approve and ratify it, and thus take upon itself direct responsibility for it. In such cases the officer committing the act is relieved from civil and criminal prosecution in the foreign country where the act was committed, should the latter happen to have control of his person. This assumption of responsibility was undertaken by Great Britain in 1837 in the case of McLeod, the leader of a Canadian force which crossed the Niagara River and committed hostilities on the American side.[3]

Qualifications due to constitutional government

Within the last century, owing to the development of constitutional government, new principles of responsibility have grown up to meet the situation where the executive branch of the government is unable to exercise constitutional control over the other branches. With respect to judicial officers in particular, a state may show that the decisions of the courts are privileged by the constitution, and that they do not represent an intent on the part of the state to give offense to another state, even though they

[1] See above, p. 156.

[2] *New York Times*, January 14, 29, February 23, 1921. For further instances see Moore, *Digest*, VI, §§ 998-1002.

[3] See above, p. 143.

actually have that effect.[1] In such cases the state need do no more than disavow any intention to give offense and meet the situation precisely as if the act in question had been committed by a party beyond its control, giving redress according to the circumstances. In like manner, in consequence of the privileged position of members of parliaments, the head of the state does not assume responsibility for what is said upon the floor of legislative assemblies, although the statements may be in themselves of the most offensive character. In the case of the United States where the separation of the powers of government is carried to an exceptional degree, it has sometimes happened that Congress as a body, not merely its individual members, has passed resolutions involving direct criticism of the policy of a foreign state which, if issuing from the executive head of the state, would be a clear ground of offense.[2] What has been said of judicial officers is equally true of subordinate municipal officers, over whose normal functions the state does not undertake to exercise immediate control.

Difficulties resulting from federal government in the United States

In consequence of the division of the powers of government between the National Government and the several States of the Union, a special difficulty has arisen in connection with the responsibility of the United States for international wrongs. The National Government, notwithstanding its powers in respect to foreign affairs, has under the Constitution no positive control over the administration of justice by the separate States. At the same time, the States themselves, having no international personality, cannot be held directly accountable by the foreign state for delinquencies whether in the form of a positive act or of a neglect to act. The problem, while primarily one of domestic constitutional law, has given rise to international complications. On several occasions the United States, in confessing to foreign states its inability to furnish redress for the delinquent acts of officers of the state governments, has been effectively answered by the foreign state by showing that such constitutional inability did not affect

[1] As in the instance of the *Costa Rica* Packet, whose Australian master was arrested by order of a Dutch court for an offense later shown to have been committed outside Dutch territorial waters. By award of an arbitrator Holland was called upon to pay damages. Moore, *Arbitrations*, V, 4948 ff. For other cases, see *Digest*, VI, § 1002.

[2] As in the instance of the Senate resolution of June 6, 1919, expressing "sympathy with aspirations of the Irish people for a government of their own choice" at a time when Great Britain was maintaining that this was a "domestic question." See above, p. 155.

CHAP. XXIII

the question of international responsibility. In the case of the Mafia riots at New Orleans in 1891 [1] Italy withdrew her minister in protest against the failure of the United States to take steps to prosecute the parties responsible for the massacre. In like manner, when Chinese subjects were killed at Rock Springs in 1885 the Chinese Government was unwilling to acquiesce in the position earlier assumed by Secretary Evarts that "so far as the arrest and punishment of the guilty parties was concerned it was a matter which belonged exclusively to the government and authorities of the State of Colorado.[2]

c. Responsibility for acts of citizens

In addition to being responsible for acts of its public officers, a state is also responsible for the acts of its individual citizens or groups of citizens. This responsibility may become direct in cases where the acts in question have been committed either with the connivance of the state authorities or in consequence of a failure on their part to exercise due diligence to maintain law and order. Except in such cases, the responsibility is indirect or vicarious, calling for punishment of the offenders and, according to the circumstances, adequate pecuniary indemnity for the losses suffered.

Acts committed against foreign states

The responsibility of a state for the acts of its citizens may arise in two distinct ways: either as the result of an offense committed by such citizens against the foreign state directly, or as the result of an offense committed by them against citizens of the foreign state temporarily or permanently resident in the state of which the offenders are citizens. Offenses of the former kind include the actual invasion of the territory of the foreign state by a group of citizens, or the preparation within the state of certain instruments of attack against the foreign state. In 1871 the United States sought to hold Great Britain responsible for the attack in 1864 upon the town of St. Albans, Vermont, by a small party of persons acting in the interest of the Confederate States who had prepared their expedition upon Canadian soil.[3] But the mixed commission, to which the claims were submitted, disallowed responsibility, on the ground of the secrecy with which the enterprise had been planned.[4] Again, Great Britain held the United States responsible for an attack by Fenians upon Canada and New Brunswick in 1866.[5] In 1916 the United States held the *de facto*

[1] See below, p. 393.
[2] Moore, *Digest*, VI, § 1025.
[3] Moore, *Arbitrations*, IV, 4042 ff.
[4] *Ibid.*, IV, 4054.
[5] *Ibid.*, I, 686, 687.

government of Mexico responsible for the invasion of American territory by a band of brigands under the leadership of Francisco Villa.[1] Numerous instances of similar direct or vicarious responsibility have arisen in time of war in connection with movements set on foot in neutral states by persons in sympathy with, or acting under contract with, one or other of the belligerents.[2] One of the most important of these cases arose between Great Britain and the United States following the American Civil War, in consequence of a demand by the latter for indemnity for losses suffered by it through the alleged failure of the former to use "due diligence" to prevent the building and equipping in its ports of vessels to be used in the service of the Confederate States.[3]

Acts committed against resident aliens

The responsibility of a state for acts of its citizens injurious to foreign citizens resident in the state varies according to the circumstances. The general principle holds that a state must afford to aliens the same measure of protection that is extended to members of the citizen body. The state must stand responsible, therefore, for any injury suffered by an alien, whether from the act of an individual citizen or from that of a group of citizens, providing it was in the power of the state to prevent the act by the exercise of due or reasonable diligence in the enforcement of the law. The question of "reasonable diligence" has been interpreted according to the standards of police administration prevailing among the leading powers. In certain states where police administration has been below the standard, there has been a tendency on the part of the larger states to demand an even fuller measure of protection for their citizens than is enjoyed by nationals of the state itself. Such, for example, has been the policy of the United States and Great Britain in relation to certain Central and South American states and to the two republics of the Caribbean. Such also has been the policy of the Great Powers in their relations with China, Persia, Morocco, and other states possessing but qualified membership in the family of nations.[4]

The Corfu crisis

A striking instance of alleged liability of a state for acts committed by individuals within its territory was presented in the peremptory demands made on August 29, 1923, by Italy upon Greece for redress for the murder of five Italian members of the international commission surveying the boundary between Albania and Greece. The demands included formal apologies and a salute

[1] See above, p. 144.
[2] See below, p. 563.
[3] See below, p. 564.
[4] See below, p. 394.

to the Italian flag, an inquiry into the circumstances of the murder, to be carried out upon the scene with the help of the Italian military attaché, capital punishment for the murderers, and an indemnity of fifty million lire to be paid within five days. In order to demonstrate the seriousness of the situation the Italian fleet attacked and seized Corfu on August 31 and held the island as security for the performance of the terms of the ultimatum. Greece thereupon applied both to the League of Nations and to the Conference of Ambassadors at Paris under whose direction the boundary commission was acting. Italy accepted the decision of this latter body after having contested the jurisdiction of the League. The unqualified demand by Italy for an indemnity was first modified by the conference so as to require the deposit of the sum in a Swiss bank, leaving it to the Permanent Court of International Justice to assess the damages. Subsequently the conference, finding Greece delinquent in her efforts to discover and punish the guilty parties, required payment forthwith of the money on deposit.[1] Corfu was evacuated on September 27.

Occasions of mob violence

It is in times of mob violence and civil war that the principle of responsibility has been most difficult of application. The practice of states shows little uniformity. Where injuries have been suffered by aliens as the result of riots temporarily beyond the power of the state to control, the United States in one case adopted the attitude of refusing to accept responsibility if citizens as well as aliens had been the victims of the disorder. On the occasion of the riots at New Orleans and Key West in 1851 following the execution of certain American filibusterers in Cuba, Secretary Webster argued that Spanish subjects were not entitled to compensation because Americans also had suffered, although in this instance the riots were directed primarily against the Spanish consul and his countrymen. While the obligation to make compensation was denied in this case, compensation was in fact granted as an act of courtesy.[2] In the case of the anti-Chinese riots in Denver in 1880, which were directed primarily against particular aliens, compensation was refused on the ground that the govern-

[1] The decision of the Ambassadors' Conference holding Greece delinquent appears to have been based upon political rather than legal grounds. At the same time the Council of the League, whose competence Italy had denied, submitted to a special commission of jurists the inquiry, "In what circumstances, and to what extent, is the responsibility of a state involved by the commission of a political crime in its territory?" See Hudson, "How the League of Nations Met the Corfu Crisis," *World Peace Foundation*, VI, No. 3.

[2] See Moore, *Digest*, VI, § 1023.

ment "had put forth every legitimate effort" to suppress the mob.[1] Again, in the case of the anti-Chinese riots at Rock Springs in 1885, responsibility was denied, on general principles, and on the special grounds that the perpetrators of the offense were also aliens and that the remoteness of the locality made it difficult to maintain law and order.[2] In the case of the Mafia riots at New Orleans in 1891 the United States, while unable, as a federal government, to bring pressure to bear upon the local authorities to prosecute the offenders, accepted a measure of responsibility and tendered to the Italian Government indemnity for the losses suffered by its citizens.[3] In this case, as in the two Chinese cases, the obligations of the United States under international law were complicated with obligations under treaties with the respective parties.

Necessity of prosecuting offenders

While vicarious responsibility for acts of mob violence, where the failure of the state to prevent them has not been due to lack of reasonable diligence, is generally held not to give rise to the obligation of making compensation for losses suffered, it is accepted to the extent of obligating the state to use every means to bring the offenders to justice. The fact that in the United States the system of federal government makes it impossible for the nation to carry out this obligation through agencies under its direct control does not alter the obligation in point of international law. Consequently the position of Secretary Evarts in reminding the Chinese Government, on the occasion of the riot at Denver in 1880, that "the powers of direct intervention on the part of this government are limited by the Constitution of the United States" was beside the point.[4]

d. Responsibility arising from civil war

The principle applied in the case of mob violence which the state is temporarily unable to control applies also to occasions of insurrection and civil war. In these circumstances, however, the freedom of the state from responsibility is not so directly affected by the question of due diligence in the suppression of the rebellion, or by the question of prosecution and punishment of the offenders. International law assumes that a state is doing all in its power to suppress such open repudiations of its authority, and it recognizes the further fact that it would be impracticable for the state to inflict punishment for the rebellion upon a whole section of the body politic. Consequently, foreigners entering the

[1] Moore, *Digest*, VI, § 1025.
[2] *Ibid.*, VI, § 1026.
[3] *Ibid.*, VI, § 1025.
[4] *Ibid.*, VI, § 1025. See above, p. 390.

CHAP. XXIII

state or residing there at the time of the outbreak share the fate of the local population, and they are not considered entitled to compensation for losses to property or injuries to person arising either from acts of belligerency committed by the insurgents or from the measures of repression taken by the state to subdue the rebellion. Such, for example, was the decision of Secretary Seward in 1862 in correspondence with the French, Austrian, and British ministers respecting claims for damages sustained by subjects of their respective states in consequence of military operations during the American Civil War.[1]

The Calvo Doctrine

The general principle of responsibility arising from civil war has become associated with the name of the Argentine publicist Calvo, who argued in his treatise on international law[2] that a state could not accept responsibility for losses suffered by foreigners as the result of civil war or insurrection, on the ground that to admit responsibility in such cases would be to menace the independence of weaker states by subjecting them to the intervention of strong states, and would "establish an unjustifiable inequality between nationals and foreigners."[3] Setting aside the grounds upon which the exemption was claimed and leaving out of account the possibility that the government may have failed to use promptly the means at its disposal to maintain its constitutional authority,[4] it would appear that the Calvo Doctrine is a correct statement of the law, in so far at least as concerns the practice of the larger states among themselves.[5]

Exceptional instances of enforced responsibility

A special rule prevails in the practice of the larger states toward some smaller or weaker states, particularly certain of the Central and South American republics, and Haiti and Santo Domingo. Owing to the frequency of domestic revolution in these states, the presumption that the state is exercising its utmost efforts to suppress the rebellion is set off against the fact that it is continually unable to do so, and must in consequence accept a responsibility based, if not upon the lack of due diligence on the part of the *de jure* government, upon the inherent weakness of the or-

[1] See Moore, *Digest*, VI, § 1032. The fact that compensation was subsequently granted as a matter of grace did not amount to the recognition of a legal principle.

[2] *Le Droit International Théorique et Pratique*, 5th ed. Tom. I, liv. iii.

[3] *Ibid.*, Tom. III, § 1280. Quoted by Moore, VI, § 1044.

[4] See the decision of Ralston in the Sambiaggio Case, Italian-Venezuelan Commission, 1903, in Ralston, *Report*, pp. 666, 680.

[5] For a discussion of the issues involved in the Calvo Doctrine, see Hershey, "The Calvo and Drago Doctrines," *Am. Journal*, I, 26 ff. Also, *ibid.*, *Analytical Index, sub tit.* "Calvo."

ganization of the state.[1] In 1900 the Great Powers held China responsible by way of indemnity for the losses incurred by foreigners in China on account of the Boxer Rebellion, which had got beyond the power of the Government to control.[2] Again in 1923 China was held responsible for the injuries inflicted upon foreigners by bandits who captured and held them for ransom. On several occasions, notably in the case of Venezuela, the United States has distinguished between a mere insurrection and a formal civil war marked by a recognition of the insurgents as *de facto* belligerents, and has held that in the former case the *de jure* government was under obligation to make compensation for losses suffered by its citizens.[3] It should be observed that the various treaties concluded between South American states and European states, which stipulate that there shall not be responsibility for losses sustained by their respective citizens from the acts of insurgents and rioters, do not affect the general rule of international law.

On the whole the practice of states has not been uniform,[4] either in assuming responsibility themselves for acts of insurgents or belligerent communities, or in demanding indemnity from other states for losses incurred by their subjects. In consequence of the absence of a satisfactory rule of customary law, a program of constructive legislation, covering cases of civil war, insurrection, and riot, was proposed by the Institute of International Law at its meeting at Neuchâtel in 1900.[5] Responsibility, measured by compensation due, was accepted in cases where the act from which the injury resulted was directed against foreigners as such; it was denied where the insurgent government had been recognized as a belligerent power by the state of which the injured party was a citizen, or where the injured person had entered the country knowing the conditions that prevailed there.

In the event of a formal war between two states there is no

[1] See the annual message of President Roosevelt, December 6, 1904, and the special message of February 15, 1905. There are, in fact, two rules applied to civil war as well as to acts of mob violence. In the case of more stable governments the presumption is on the side of the state that it is doing all in its power to suppress the rebellion; in the case of less stable governments the presumption is to the contrary.

[2] For details of the political and legal aspects of the question, see Moore, *Digest*, V, §§ 808-810.

[3] *Ibid.*, VI, § 1046.

[4] The United States has been conspicuous in its lack of consistency, at times imposing responsibility upon other states in cases similar to those in which it has refused itself to assume responsibility. See Moore, *Digest*, VI, Chap. XXI, *passim*.

[5] *Resolutions*, 159.

CHAP. XXIII

Responsibility arising from international war

question of responsibility on the part of either of them for losses suffered by foreigners, whether from acts of the enemy in occupation or from acts of the *de jure* government in conducting military operations. International law recognizes that in such cases the state is, on the one hand, powerless to prevent the acts of the enemy, and is, on the other hand, too deeply committed to the necessity of self-preservation to be able to take into account the special interests of aliens who happen to be temporarily or permanently resident within its jurisdiction.[1]

[1] For example, the United States refused compensation to the Eastern Extension Telegraph Company, British owned, for losses resulting from the cutting of cables connecting Cuba and Porto Rico with the outer world. Benton, *International Law of the Spanish-American War*, 212.

PART IV. INTERNATIONAL PROCEDURE FOR THE PROTECTION OF RIGHTS

CHAPTER XXIV

PEACEFUL PROCEDURE

a. International procedure in general

In the theory of general jurisprudence a distinction is made between the *substantive law,* which defines the rights which the law will aid and protect, and the *adjective law* or *law of procedure,* which prescribes the methods by which the rights recognized by the substantive law may be made effective.[1] It has been shown above that an essential part of the rights defined by the substantive law are certain remedial rights which entitle their possessor to use due and proper means to enforce his primary rights.[2] Strictly speaking, these remedial rights are distinct from the procedure by which they are made effective, the latter representing the methods prescribed by the law to be followed when a particular form of recognized redress is resorted to. In consequence, however, of the limited legal character of certain of the methods of peaceful procedure and of their development from optional to semi-obligatory forms of procedure, the right to use these remedies, together with the procedure to be followed in resorting to them, has generally been embodied in the same international document. Hence it will be found convenient to consider together the legal character of the remedy and the machinery by which it is put into motion. In the case of the forcible remedy of self-help, international custom has marked off the procedure of war as a distinct procedure, the rules of which have not been confused with the right to use the particular remedy.[3]

b. Negotiation

As has been pointed out above,[4] the drastic nature of war as the ultimate form of self-help in the assertion of national policies or in the defense of national rights has led to the creation of a legal obligation to negotiate in advance of an appeal to force. Apart from any obligation to negotiate, this form of peaceful procedure would doubtless play an even larger part in international law than is played in municipal law by the practice of "settlement out of court." Convenience, if not obligation, would lead the state

[1] See Holland, *Elements of Jurisprudence,* 8th ed., 315.
[2] See above, p. 379. [3] See below, p. 428. [4] Page 382.

in most cases to seek its remedy first by a reasoned appeal to the opposing party; and as a matter of fact an exchange of diplomatic notes, in many cases running over a long period of years, has, with few exceptions, regularly preceded the resort to forcible measures of redress. Looking at negotiation from the side of law, it would seem that long custom has given a definite legal standing to this form of procedure.[1] In the comparatively few cases within recent years in which negotiations have been abruptly cut short by one of the parties, the public opinion of the international community has apparently been shocked by the violation of the obligation to negotiate, independently of the merits of the controversy between the parties. From the point of view of international morality, it would seem to make but little difference whether a state manifests its intention to enforce certain claims frankly and ruthlessly, or conceals them to a degree behind skilful and persistent diplomatic negotiations. Nevertheless, the international community appears to have given its sanction to the necessity of negotiation, if only for the reason that it admits the possibility, at any time during the negotiations, of a satisfactory concession on the part of the state upon which the demand is made, and makes it possible for third states to intervene as friendly mediators between the parties. In 1911 the action of Italy in sending an ultimatum to Turkey before negotiations had beeen exhausted was generally condemned by the neutral press, although the foreign offices of the nations remained officially silent. Again, in 1914, the peremptory ultimatum of Austria-Hungary to Serbia caused a shock to neutral public opinion and undoubtedly contributed to the impression among neutral states that the action of Austria-Hungary had ulterior motives behind the redress of the immediate grievance at issue. It would seem, perhaps, that, apart from the obligation of negotiation resulting from customary law, an implied obligation to negotiate was recognized by the signatory powers of the Hague Convention for the Pacific Settlement of International Disputes.[2]

c. Good offices and mediation

The history of international relations contains numerous instances of intervention on the part of third states in cases where the conflict of rights between two or more states appears to be beyond the ability of the parties to settle by peaceful means.

[1] Using the term "legal" in the sense appropriate to international law. See above, pp. 40-43.

[2] Article 38 of the convention of 1907 recognizes arbitration as the most effective and equitable means of settling disputes "which diplomacy has failed to settle."

In some instances the intervention has been by means of armed force, in which case it has itself added a new element to the dispute, and must be regarded as political action not part of legal international procedure. Such, for example, was the mediation or intervention of the Great Powers between Greece and Turkey in 1868 in relation to the island of Crete, and again between Turkey and Crete in 1897.[1] In other cases the intervention has been friendly and non-compulsory in character, undertaken with the object of reconciling the differences between the opposing parties and proposed to them for acceptance or rejection according to their free choice. In 1856 the signatory powers of the Treaty of Paris obligated themselves, in the event of a dispute between the sultan and one or other of them, to have recourse to the mediatory action of the whole body of signatories.[2] At the same time a protocol was adopted in which the obligation of the treaty was presented in the form of a *vœu* to which all states were invited to adhere.[3] While as many as forty states adhered to the protocol, its restrictive clause, "as far as circumstances might permit," rendered it practically ineffective. A similar limited obligation to have recourse to mediation, or, if preferable, arbitration, was entered into by the signatory powers of the Berlin treaty of 1885.[4] An instance of mediation in anticipation of war is to be seen in the settlement of the dispute between Germany and Spain over the Caroline Islands by mediation of Pope Leo XIII.[5] An instance of mediation with the object of putting an end to hostilities is to be seen in the mediation of the United States in 1866 between Spain on the one hand and Peru, Chile, Bolivia, and Ecuador on the other.[6] The right of either party to refuse an offer of arbitration is exemplified in the refusal of the United States in 1898 to accept the tender of good offices made by Great Britain, France, Austria, and the pope.[7]

In 1899 the Hague Peace Conference, being impressed with the advantages of such friendly intervention for the maintenance of the general peace, endeavored to give a qualified legal standing

[1] See Bonfils-Fauchille, *Droit International*, Nos. 938, 942.
[2] Art. VIII.
[3] Bonfils-Fauchille, *op. cit.*, No. 936.
[4] Art. 12. *Br. and For. State Papers*, LXXVI, 4.
[5] See Stowell and Munro, *International Cases*, I, 49.
[6] See Moore, *Digest*, VII, § 1067.
[7] Further instances may be found in Moore, *Digest*, VII, §§ 1065-1067. Bonfils-Fauchille, *Droit International*, Nos. 937-942. For the distinction between a mere offer of good offices and the active duties of mediation, see Potter, *Introduction to International Organization*, Chap. XIII.

CHAP. XXIV

to it as a form of procedure. The convention for the Pacific Settlement of International Disputes provided for a recourse by the disputants themselves, before an appeal to arms, to the good offices or mediation of one or more friendly powers.[1] A further article sanctioned the action of third powers in coming forward upon their own initiative and offering as far as the circumstances allowed their good offices and mediation to the states at variance. This offer might be made even during the course of hostilities, and could in no case be regarded as an unfriendly act. Succeeding articles, after pointing out the duties of the mediator to act as a friendly compositor, emphasized the right of the contending parties to reject the offer of mediation and the optional character of the advice that might be offered.[2] A special procedure was recommended by which the two parties might each choose a third state, thereupon leaving it to the two mediators to find a solution if possible.[3]

Semi-legal character of mediation

It will be observed that none of the provisions of the Hague Convention contain any element of direct legal obligation on the part of the contending states to accept the intervention of third states. The procedure of mediation has, however, a semi-legal character in the recognition by the international community of the general principle of the desirability of the tender of good offices and mediation, and of the right of third states to intervene without encroaching upon the parallel right of the contending parties to be the ultimate arbiters of their own claims. Within its limited scope, therefore, the right to tender good offices or mediation represents an inchoate sense of collective responsibility on the part of the community of nations as a whole for the maintenance of peace. In this respect the provisions of the Hague Conference must now be supplemented by those articles of the Covenant of the League of Nations which provide for the intermediation of the members of the League as a body in the interest of the general peace. Article 11 provides that "any war or threat of war, whether immediately affecting any of the members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations." Article 16 provides for the collective intervention of the League in the event of a resort to war by one or other of the contending parties in violation of the

[1] Art. 2. *Hague Conventions*, 43.
[2] Art. 4-6.
[3] Art. 8.

several agreements to submit the dispute to arbitration. As has been pointed out above,[1] these provisions are of the highest theoretical importance, since they represent the acceptance by the members of the League of a collective responsibility for the peace of the international community. Their practical importance remains, however, to be tested. They definitely establish the principle that, to the extent defined by the covenant, states are no longer free to resort to the procedure of self-help, even when the methods of peaceful procedure have been exhausted, without risking the intervention not merely of one or more powers personally interested, but of the entire body of the League.[2]

d. Arbitration

International arbitration was officially defined by the first Hague Peace Conference as having for its object "the settlement of differences between States by judges of their own choice, and on the basis of respect for law."[3] It would seem that the definition is consistent with the past practice of arbitration except that for the term "law" should be substituted "such principles and rules as have commended themselves to the states having recourse to that method of procedure."[4] Arbitration has been resorted to by states from the earliest days of the development of international law and has taken many different forms, so that the term has been applied, particularly within recent years, to include any form of peaceful settlement in which there are elements of a judicial decision, reconciling the conflicting points of view, but lacking the authority of law. The definition of the Hague Conference may therefore be accepted as in general conforming to actual usage, subject, however, to correction in respect to specific cases of international practice.

Free choice of judges

The essential character of arbitration lies in the fact that the tribunal appointed to decide the dispute is formed by the parties themselves. The free choice of the arbitrators for the particular dispute that is to be submitted to them distinguishes arbitration from the judicial processes familiar to municipal law. There must be a present confidence of the contending parties in the ability of the particular arbitrators to render a satisfactory decision of the

[1] Page 48. [2] See above, p. 381.

[3] Art. 15, Convention for the Pacific Settlement of International Disputes, 1899.

[4] The Hague Convention had in mind the decision of cases in accordance with principles of law where such principles existed and were applicable, without encroaching upon the right of the parties to adopt special rules for the particular case. Compare the decisions *by law*, i.e., by the application of pre-existing rules, which are the ideal of judicial settlement. See below, p. 410.

case submitted to them. If the arbitrators be chosen by others than the parties to the dispute, or even by the parties themselves in advance of the dispute, or if they be chosen by lot from an indiscriminate group, the decision rendered by them would seem to be not strictly arbitral, although often popularly described as such. The procedure of international arbitration should therefore not be confused with the varieties of informal judicial process known as "arbitration" in municipal law,[1] in respect to which the parties have at times no option or a limited option as to the choice of the arbitrators.[2]

Basis of the arbitral decision

A further characteristic of arbitration is that the settlement sought to be reached by that procedure must be on the basis of accepted principles or rules known beforehand to the contending parties. A settlement by the arbitrators reached without reference to some accepted standards of conduct, and based wholly upon their own sense of what was demanded in point of equity or expediency, would seem to partake of the nature of friendly mediation rather than of arbitration. In cases where the dispute involves a question of fact rather than of principle, as in the controversy between the United States and Great Britain in 1794 with reference to the St. Croix River boundary,[3] and in general in cases relating to the interpretation of treaties, the task of the arbitrators is limited to the decision of concrete issues and need have no reference to general principles of law other than those bearing upon the interpretation and obligation of treaties. When, however, the dispute involves claims based upon the violation of alleged rights, the validity of which is disputed by the party defendant, the arbitral tribunal may be called upon first to determine what rules of law were in force at the time and then to apply them to the facts presented by the controversy.

Owing to the indefinite character of many of the rules of international law, the contending parties have frequently stipulated in the agreement, or *compromis,* under which the dispute is submitted to arbitration that the decision of the arbitrators must be in accordance with certain defined principles, whether these be rules of law alleged to have been in existence at the time the controversy started, or the general principles of equity, or special rules intended

[1] Such as, for example, the procedure of "arbitration" before the United States Railway Labor Board under the Transportation Act of 1920.

[2] For a discussion of arbitration as distinct from judicial process, see Baty, *International Law,* Chap. I.

[3] See Moore, *Int. Arbitrations,* I, 1-43.

to hold good only in the particular case. The Treaty of Washington of 1871 between Great Britain and the United States provided that the decision of the arbitral tribunal set up for the settlement of the Alabama Claims should be governed by three rules agreed upon by the parties as applicable to the case, and by such principles of international law, not inconsistent with those rules, as the arbitrators might determine to have been applicable.[1] While Great Britain was unwilling to assent to the three rules as principles of international law in force at the time the claims arose, it accepted them as a satisfactory basis for the existing case and for future cases.[2]

Legal obligation to submit to the award

The procedure described in the preceding paragraphs represents merely the voluntary practice of a number of states during the course of the nineteenth century, and therefore contains no element of international obligation. It would appear, however, that then as now international law intervened at the conclusion of the procedure to the extent of prescribing in a vague way the obligation of the parties to abide by the award of the arbitral tribunal. The terms of the submission and the personnel of the tribunal might be freely determined by the two states; but once the machinery was set in motion the rule of good faith demanded that the award be loyally carried out. Exceptions are to be noted, as in the application of the rule of good faith to other treaty agreements. If the decision of the arbitral tribunal were clearly in excess of the terms of the *compromis* under which the dispute was submitted to arbitration, the party unfavorably affected was not regarded as bound by it. On this ground the award rendered in 1831 by the king of Holland in the Northeastern Boundary Dispute between Great Britain and the United States was set aside by both parties.[3] The same held true in cases where the arbitral tribunal was proved to have been guilty of fraud or corruption in reaching its award. As a point of legal theory, it has been argued that the award must not be contrary to the principles of fundamental justice or the accepted rules of international law; but as a prac-

[1] Art. VI. Malloy, *Treaties*, I, 700. See below, p. 564.

[2] "In order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future," the British Government agreed that in deciding the questions arising out of the said claims "the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules." *Ibid.* Compare the arbitral provisions of the Jay Treaty of 1794, where existing principles of law were adequate. *Ibid.*, I, 590.

[3] See Moore, *Digest*, VII, § 1082; *International Arbitrations*, I, 81-161.

CHAP. XXIV

tical matter the urgency of the need of manifesting good faith has generally taken precedence over the contentions of the losing party.[1] The Hague Convention for the Pacific Settlement of International Disputes merely repeats the rule of customary law in prescribing that "recourse to arbitration implies an engagement to submit loyally to the award."[2]

e. Development of the obligation to arbitrate

The growth of the practice of arbitration as an amicable means of settling disputes between states constitutes one of the most conspicuous features of the history of international relations during the nineteenth century. Decade by decade, beginning with the Jay Treaty of 1794, an increasingly large number of cases was submitted to arbitration.[3] In most instances the disputes were submitted in accordance with an agreement, or *compromis*, drawn up at the time the question at issue became acute. The obligation to arbitrate was thus assumed after the outbreak of the controversy which it was intended to settle. On occasion, when treaties were concluded creating a state of affairs which it was thought might give rise to future controversy, a clause was inserted among the provisions stipulating that if disputes should arise with respect to the subject-matter of the treaty they should be submitted to arbitration.[4] This practice became frequent during the latter part of the nineteenth century, and marked a limited recognition of the principle of obligatory arbitration as between the contracting parties. On other and rarer occasions the conclusion of a treaty was marked by the insertion of a clause expressing the desirability of a resort to arbitration for all disputes to which its application might be feasible, as in the case of the Treaty of Guadalupe-Hidalgo between the United States and Mexico in 1848,[5] or, again, a clause stipulating an express obligation to arbitrate disputes in general, exclusive of certain issues, as in the treaty between Holland and Portugal in 1894.[6]

During the last quarter of the nineteenth century a number of

[1] See Hall, *International Law*, § 119.

[2] Art. 37, convention of 1907.

[3] The literature of the history and practice of arbitration is bulky. For select references see Potter, *Introduction to International Organization*, Appendix B, §§ 14-16. For a brief historical sketch see Moore, *International Arbitrations*, V, 4821 ff. For the practice of the United States, see *ibid.*, Vols. I-V. For the practice of states generally, see Darby, *International Tribunals*, 4th ed., 1904; La Fontaine, *Pasicrisie Internationale*.

[4] As, for example, in the treaty of 1796 between the United States and Tripoli, Art. XII. Malloy, *Treaties*, II, 1785.

[5] Art. XXI. Malloy, *Treaties*, I, 1107.

[6] Martens, *Nouveau Recueil Général*, 2e Ser. XXII, 590; cited by Oppenheim, *International Law*, II, 17.

General arbitration treaties

treaties were entered into, particularly by the South American states, having as their primary object the settlement by arbitration of possible future disputes. These so-called "general arbitration treaties" as a rule made exception of disputes involving the independence, the honor, or the vital interests of the contracting parties. They increased greatly in number as a result of the influence of the first and second Hague Peace Conferences, and by the close of the first decade of the twentieth century they existed, in bilateral form, between practically all of the important states of the world.

Exceptions and qualifications

The chief point of legal interest in connection with them is the form in which the exception from the obligation to arbitrate was entered. The Root treaties of 1908, concluded between the United States and a dozen other powers singly,[1] were typical in providing for the arbitration of "differences which may arise of a legal nature or relating to the interpretation of treaties . . . provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties." The defect of these treaties was soon seen to lie in the obvious fact that the cases covered by the proviso were the very ones which experience had shown were likely to lead to serious controversy.[2]

In 1911 an effort was made by the United States to draw a more logical distinction between disputes which might and others which might not be submitted to arbitration, and treaties, known as the Taft-Knox Treaties, were negotiated in which the phrase "differences . . . of a legal nature" in the treaties of 1908 was replaced by "differences . . . which are justiciable in their nature," these being defined to be differences "susceptible of decision by the application of the principles of law or equity."[3] At the same time the proviso of the treaties of 1908 was omitted. Moreover, the obligation to arbitrate was greatly strengthened by a provision to the effect that, should the parties disagree as to whether a particular difference was justiciable within the terms of the treaty, the question should be submitted to the impartial deci-

[1] See, for example, the treaty between the United States and Great Britain, Malloy, *Treaties*, I, 814.

[2] For example, the United States Government would apparently not have considered the dispute with Colombia over the Isthmus of Panama as coming within the terms of the treaty had there been one with Colombia, and did not in fact consider the dispute with Great Britain over the question of tolls at the Canal as within the terms of the actual treaty.

[3] For the text of the treaty with Great Britain, see Charles, *Treaties*, 385.

sion of a joint high commission of inquiry.[1] This paragraph was stricken out by the United States Senate, and the treaties were amended in other respects; with the result that the President refused ratification on his part. In the meantime, beginning with the treaty between Chile and Argentina in 1902, several states had entered into treaties in which the obligation to arbitrate future differences was assumed without qualifications of any kind.[2]

Limited international obligation to arbitrate

It is important to observe that in all of these bilateral arbitration treaties the obligation assumed, whether limited or unrestricted, is a voluntary contractual obligation between the parties to the treaty. International law enters into the agreement only to the extent of prescribing the rule of good faith in respect to the fulfilment of the conditions of the treaty. Not until the Hague Conference of 1899 did the obligation to arbitrate begin to take on an inchoate legal character in respect to the community of nations as a body. The Convention for the Pacific Settlement of International Disputes announced that "in questions of a legal nature, and especially in the interpretation or application of international conventions," arbitration was recognized as the most effective and equitable means of settling disputes which diplomacy had failed to settle.[3] This statement of general principle was repeated at the Second Hague Conference, and was followed by a clause proclaiming the desirability of a recourse to arbitration in so far as circumstances might permit.[4] At the same time, in its final act the conference went on record as being "unanimous, 1. In admitting the principle of compulsory arbitration, 2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration without any restriction."[5] The adoption of this mere expression of opinion registered the failure of the efforts made by a number of powers to have an agreement adopted providing for obligatory arbitration of an "exclusive" character, similar to the bilateral obligation contained in the Root treaties of 1908.[6]

[1] The Root treaties required that, in advance of an actual resort to arbitration, a separate treaty, known by the French designation *compromis*, should be entered into stipulating the conditions under which the dispute should be arbitrated. Thus the decision whether a given dispute came within the terms of the general treaty was taken by each state separately.

[2] For the text of the treaty between Chile and Argentina, see *Am. Journal*, I (1907), Supp., 292.

[3] Art. 16. *Hague Conventions*, 55. [4] Art. 38. *Ibid.* [5] *Ibid.*, 27.

[6] For a discussion of the attitude of the leading powers at the Second Hague Conference in respect to the question of restricted obligatory arbitration,

In one specific class of cases, however, the conference went to the length of assuming a practically unqualified obligation to arbitrate. A Convention respecting the Limitation of the Employment of Force for the Recovery of Contract Debts was adopted, in accordance with which the contracting powers "agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals." [1] An exception was noted in case the debtor state refused to arbitrate the case, or failed to carry out the award of the tribunal.

Disputes involving contract debts

The Covenant of the League of Nations advances a step beyond the Hague Conferences toward making arbitration compulsory, but stops short of creating a legal obligation. Article 12 pledges the members of the League, in the event of a dispute arising between them, to submit the matter either to arbitration or to inquiry by the Council. Article 13 stipulates that matters suitable for submission to arbitration must be so submitted, and it enumerates as such disputes involving the interpretation of a treaty, questions of international law, questions of fact bearing upon the breach of an international obligation, or the reparation to be made for such breach. The obligation created by Articles 12 and 13 consists, therefore, primarily in the recognition of a general principle; but it contains an element of compulsion in that the alternative to arbitration must be submission of the dispute to inquiry by the Council. [2]

Obligations under the Covenant of the League of Nations

Closely connected with the progressive succession of steps toward the adoption of a general international obligation to arbitrate disputes within a restricted field have been the measures taken to secure the establishment of an international court of arbitration. These measures may be divided into two distinct groups. In the first place there was the transitional stage in which the community of nations, without seeking to intervene in any way between two contending states, endeavored to advance the practice of arbitration by facilitating the selection of judges and giving greater assurance of their fitness for their task. With this object, the Hague Peace Conference of 1899 created the new Permanent Court of Arbitration,[3] which consisted in a list of judges available at all

f. The Hague Permanent Court of Arbitration

see Higgins, *The Hague Peace Conferences,* 82-84; Scott, *The Hague Peace Conferences of 1899 and 1907,* I, 330 ff.

[1] For the text of the convention, see *Hague Conventions,* 89.

[2] See below, p. 417.

[3] Art. 15-57, Convention for the Pacific Settlement of International Disputes. *Hague Conventions,* 55 ff.

CHAP. XXIV

times and acting, in default of an agreement to the contrary between the parties, in accordance with fixed rules of procedure. These judges, selected by the signatory powers to the number of four each, were to be persons of "known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrators."[1] Upon having recourse to the Permanent Court, the contending parties were to choose their arbitrators from the general list, each party appointing two arbitrators, who together were to choose an umpire. This latter feature was modified by the Hague Conference of 1907 by the provision that of the two arbitrators appointed by each party only one should be its national or chosen from among the persons nominated by it as members of the court.[2] The provisions of the convention encroached, therefore, to but slight degree upon the free choice of the arbitrators by the contending parties. Details of procedure were provided for, failing agreement between the parties upon a special procedure.[3]

Judicial settlement *versus* arbitration

The second group of measures for the establishment of an international court had a fundamentally different object. They proposed that the arbitration of disputes by temporary tribunals established by the contending parties should be accompanied, and if possible, replaced by the judicial settlement of disputes at the hands of a permanent international tribunal. The theory came to be widely held at the Second Hague Conference not only that disputes between states would be more readily disposed of if a truly permanent judicial tribunal were established, but that such a tribunal, sitting continuously and possessed of a sense of judicial responsibility, would further the development of international law by building up a system of international jurisprudence in the form of precedents having the force of law. The establishment of a permanent court would, it was said, tend to promote the pacific settlement of international disputes by insuring, in cases where legal rights were at issue, a decision on the basis of law rather than one on the basis of compromise, to which arbitration courts were naturally inclined.[4] The court proposed was to be "freely and

[1] Art. 23. [2] Art. 45.

[3] Chap. III. It should be observed that in spite of its title the Permanent Court of Arbitration was not a standing tribunal, but merely a group of judges from among whom special arbitrators might be chosen in each case. The fact that certain members of the Court, e.g., Lammasch of Austria, sat on more than one tribunal was an accident of choice, not part of the prescribed plan.

[4] The arguments in favor of judicial settlement, both those presented to the conference and those subsequently advanced by the chief proponents of "judi-

easily accessible, composed of judges representing the various judicial systems of the world, and capable of insuring continuity in arbitral jurisprudence."[1]

The Judicial Arbitration Court

The establishment of an international court presented two distinct difficulties. The first was that of deciding upon the composition of the court. A court of some forty-five members, representing each of the members of the community of nations, was obviously too unwieldy to be practicable. A smaller court, it was thought, must necessarily favor the larger as against the smaller states. In consequence of the sharp division of opinion upon this point it was found impossible to reach a satisfactory compromise.[2] The conference therefore adopted a "Draft Convention Relative to the Creation of a Judicial Arbitration Court,"[3] in which the organization and procedure of the new court were prescribed in detail, but no mention was made of the selection of the judges. In general the judges were to be "chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts, or to be jurists of recognized competence in matters of international law."[4] In the final act of the conference a formal *vœu* or wish was expressed in which the conference called the attention of the signatory powers to the advisability of adopting the annexed draft convention for the creation of the Judicial Arbitration Court, and of bringing it into force as soon as an agreement had been reached respecting the selection of the judges of the court.[5]

Jurisdiction of the court

The second problem was that of determining the jurisdiction of the court. In consequence of the unwillingness of a number of

cial settlement," may be found in J. B. Scott, *An International Court of Justice; The Status of the International Court of Justice; The Hague Peace Conferences*, I, Chap. IX; H. Wehberg, *The Problem of an International Court of Justice.*

[1] Art. I of the Draft Convention.

[2] For a discussion of the various compromise plans proposed by the advocates of the court, see Higgins, *Hague Peace Conferences*, 514 ff.; Scott, *Hague Peace Conferences of 1899 and 1907*, I, 437 ff.

[3] For the text of the convention, see *Hague Conventions*, 31; Higgins, *op. cit.*, 498. It should be observed that the court is also known in the United States as the "Court of Arbitral Justice," the name given it by the American delegation at the Hague.

[4] Art. 2. The court was, moreover, to be composed of judges "representing the various judicial systems of the world, and capable of insuring continuity in arbitral jurisprudence." (Art. 1.)

[5] *Hague Conventions*, 28. In 1909 Secretary Knox proposed to the signatory powers of the two conventions that the International Prize Court created by the convention of 1907 be invested with the functions of the Judicial Arbitration Court; but the question of the composition of the court continued to be the stumbling-block. See *Am. Journal*, IV (1910), 163, Supp., 102.

CHAP. XXIV

states to obligate themselves to arbitrate even a limited number of disputes, the jurisdiction of the Judicial Arbitration Court was left optional and the tribunal was merely declared "competent to deal with all cases submitted to it, in virtue either of a general undertaking to have recourse to arbitration or of a special agreement."[1] Succeeding articles provided that a delegation of the judges might decide certain questions in connection with the provisions of the Convention for the Pacific Settlement of International Disputes, in case the parties were willing to have it do so.[2]

The International Prize Court

In addition to the proposed Judicial Arbitration Court the Second Hague Conference created an International Prize Court for the settlement by a permanent tribunal of the special class of disputes growing out of the capture of national property by belligerents in time of war.[3] Both in its organization and in its jurisdiction this court marked a significant advance toward the establishment of international judicial tribunals. The problem of the composition of the court, presenting difficulties similar to those which defeated the creation of the Judicial Arbitration Court, was solved by granting to the great powers a permanent representation on the tribunal and to the smaller powers a periodic representation, based upon a system of rotation which gave longer terms in proportion to the political rank of the state.[4] In respect to jurisdiction, the court was given the authority to hear cases on appeal from the national courts, whether brought by neutral states themselves or by neutral individuals.[5] While the convention establishing the court was signed by a large majority of the powers assembled at the conference, subject in certain cases to reservations, it was not ratified by the respective states, chiefly on the ground that before the court could function satisfactorily it was necessary to formulate an adequate body of maritime law.[6]

g. The Permanent Court of International Justice

In view of the failure to establish the proposed Judicial Arbitration Court, the signatory powers of the Covenant of the League of Nations made provision that the Council should "formulate and submit to the members of the League for adoption plans for the establishment of a permanent Court of International Justice."[7]

[1] Art. 17. [2] Art. 18, 19.

[3] For the text of the convention, see *Hague Conventions*, 188; Higgins, *op. cit.*, 407.

[4] Art. 15. For discussion of the method of rotation, see Higgins, *op. cit.*, 439; Scott, *Hague Peace Conferences*, I, 457.

[5] Art. 1-6.

[6] For the relation of the International Prize Court to the Declaration of London, see below, p. 553. [7] Art. 14.

In pursuance of this agreement an Advisory Committee of Jurists met at the Hague in June, 1920, and drew up a Draft Scheme for the Institution of the Permanent Court of International Justice.[1] This scheme dealt with the two fundamental problems of the organization and jurisdiction of the proposed court as follows: the court was to consist of fifteen members, eleven judges and four deputy judges,[2] to be elected by the Assembly and the Council of the League from a list of persons nominated by the judges forming the Hague Permanent Court of Arbitration, acting for this purpose by national groups.[3] The qualifications of the judges of the new court in respect to moral character and legal competence followed the provisions of the Hague conventions, and it was particularly stressed that not only should the individual judges possess the qualifications required, "but the whole body also should represent the main forms of civilization and the principal legal systems of the world."[4] The jurisdiction or competence of the court was defined as being "to hear and determine cases of a legal nature concerning: a. the interpretation of a treaty; b. any question of international law; c. the existence of any fact which, if established, would constitute a breach of an international obligation; d. the nature and extent of the reparation to be made for the breach of an international obligation; e. the interpretation of a sentence passed by the Court."[5] Further, it was provided that in the event of a dispute as to whether a certain case came within any of the categories enumerated, the matter should be settled by the decision of the Court.[6]

The Statute of the court

When presented to the Council and the Assembly of the League, the draft scheme was amended in a number of points, particularly in respect to the provisions for obligatory arbitration within the prescribed field. The jurisdiction of the court was, in so far as the members of the League as a body were concerned, limited to comprise "all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force."[7] Provision was made, however, that individual members of the

[1] For the text of the draft scheme, see *Am. Journal*, Supplement, XIV (1920), 371.

[2] Art. 3. [3] Art. 4. [4] Art. 2, 9.

[5] Compare Art. 13 of the Covenant of the League of Nations.

[6] Art. 34. A further article (33) gave to the complainant state the right to bring the case before the court upon its own initiative when other means of settlement had failed.

[7] Art. 36. The article permitting process by action of the party complainant was omitted.

League might, at the time of signing the agreement or later, "declare that they recognize as compulsory, *ipso facto* and without special agreement, in relation to any other member or state accepting the same obligation," the jurisdiction of the court in respect to the several classes of disputes enumerated in Article 34 of the draft.[1] This declaration might be made unconditionally or on condition of reciprocity on the part of others. The decision whether a particular dispute fell within the jurisdiction of the court under such circumstances was to be settled by the court itself.[2] The draft as amended was finally approved by the Assembly on December 13, 1920, and was attached in the form of a "statute" to the protocol of signature signed December 16, 1920.[3] Ratifications of the protocol have been made to date by thirty-six of the forty-seven states which have signed it.[4]

h. Commissions of inquiry

Distinct from the settlement of international disputes by arbitration between the parties, or by the decision of a permanent international tribunal, has been the practice of resorting to international commissions of inquiry. These commissions represent for the most part a final effort on the part of the contending states to reach a friendly settlement when the procedure of arbitration has not been found adequate or satisfactory for that purpose. They may be regarded as a continuance of the procedure of negotiation under conditions more likely to preserve the peace than the interchange of notes between the contending foreign offices. Their function has been frequently limited to the ascertainment of the disputed facts of the case, but on other occasions it has been as comprehensive as the circumstances of the dispute. The report of these commissions has lacked, as a rule, the authority of an arbi-

[1] Art. 36. The "Optional Clause" has been signed (1923) by twenty-one states, including Austria, Brazil, Netherlands, Norway, and Switzerland, but, at date of writing, not including any of the Great Powers.

[2] Art. 36.

[3] For the text of the Protocol of Signature and of the Statute, see Appendix B. The "rules of court" adopted by the court may be found in *Am. Journal*, Supp., XVI (1922), 173-190.

[4] On February 24, 1923, President Harding submitted to the Senate the protocol of the Permanent Court and asked consent of the Senate to the adhesion of the United States to that document. The message was accompanied by a letter from the secretary of state indicating how, with certain reservations, the United States might "fully adhere and participate, and remain wholly free from any legal relations to the League [of Nations] or assumption of obligation under the Covenant of the League." For the text of the message and the accompanying letter, see *Am. Journal*, XVII (1923), 331 ff.

For the decisions thus far rendered by the court, see above, pp. 278, n. 6; 164, n. 4; 167, n. 2. The records of the first and second years of the court are surveyed by M. O. Hudson, *Am. Journal*, XVII, 15-28; XVIII (1924), 1-37.

tral award, and has further to be distinguished from the latter in being based, where it dealt with rights as well as with facts, not upon accepted principles laid down in advance, but upon the equities of the case as they appeared to the commission. The procedure has thus been more elastic than that of arbitration proper, and it has aimed, by the avoidance of a binding decision, to induce the contending parties to permit the fullest light to be thrown upon the dispute, and to bring into play the conciliatory action of general public opinion.

Provisions of the Hague Convention

Leaving out of account the numerous mixed commissions of an administrative character which have been appointed from time to time for the delimitation of boundary lines or the adjudication of private claims, where the principles upon which the decision of the commission was to be based have been laid down in advance, the commission of inquiry made its appearance in international law at the meeting of the Hague Peace Conference of 1899. The Convention for the Pacific Settlement of International Disputes made provision that "in disputes of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact," it was deemed expedient to institute an international commission of inquiry with the object of facilitating a settlement of the dispute by an impartial investigation of the facts.[1] The composition of the commission was to follow the provisions for the constitution of the arbitral tribunals provided for by the same convention.[2] The convention of 1899 thus secured the appointment of one neutral commissioner, and the convention of 1907 the appointment of three neutrals. It was further provided that, since the report of the commission was limited to a finding of fact, it should have in no way the character of an arbitral award, and should leave the parties entire freedom as to the effect to be given to the finding.[3]

The Dogger Bank case

An opportunity for putting into effect the procedure devised by the Hague Conference was presented in 1904 in relation to the disputed facts connected with the Dogger Bank incident. In that year certain Russian warships, on their way to the Far East, fired by mistake upon a fleet of British fishing-vessels. An international commission of inquiry was appointed, three of whose members were of neutral nationality, and was empowered to inquire

[1] Art. 9, conventions of 1899 and 1907.
[2] Art. 11 (1899); Art. 12 (1907). See above, p. 410.
[3] Art. 14 (1899); 35 (1907).

CHAP. XXIV

into and report upon all circumstances relating to the North Sea incident, and particularly upon the question as to where the responsibility lay, and upon the degree of blame attaching to the nationals of the contracting parties or of other countries.[1] In respect to the scope of its jurisdiction, therefore, the North Sea Commission went beyond the provisions of the Hague Convention and exercised what were in fact the functions of an arbitral tribunal.[2] The success of the commission, which met under circumstances of unusual tension between the two states, greatly enhanced the prestige of that method of settling disputes, and led to the introduction at the Second Hague Conference of a number of changes in respect to procedure based upon the actual experience of the Dogger Bank case.[3]

The Treaties for the Advancement of Peace

Not only has the community of nations recognized commissions of inquiry as a special form of international procedure, but a number of individual states have entered into bilateral compacts providing for a resort to such commissions in the event of the failure to settle a dispute by diplomatic negotiation. The Wilson-Bryan treaties of 1913-14 represent an attempt to overcome the obvious objection to the earlier arbitration treaties,[4] which left a loophole of escape from the obligation in cases where the state did not wish to submit a particular dispute to arbitration. Subject to variations in phrasing, these treaties provide that "the High Contracting Parties agree that all disputes between them, of every nature whatsoever, other than disputes the settlement of which is provided for and in fact achieved under existing agreements between the High Contracting Parties, shall, when diplomatic methods of adjustment have failed, be referred for investigation and report to a permanent International Commission, to be constituted in the manner prescribed in the next succeeding article; and they agree not to declare war or begin hostilities during such investigation and before the report is submitted."[5] The report

[1] The text of the Russo-British protocol under which the commission was established may be found in *Am. Journal*, II, 929. For the report of the commission, see *ibid.*, 931.

[2] See Hershey, *International Law and Diplomacy of the Russo-Japanese War*, 240-241.

[3] See Art. 10-36, Convention for the Pacific Settlement of International Disputes. Also, Higgins, *Hague Peace Conferences*, 167-170.

[4] See above, p. 407.

[5] Art. I, treaty between the United States and Great Britain, September 15, 1914. *Treaties for the Advancement of Peace*, 41. The treaty with France is significant in providing that in case of disputes not settled by "ordinary methods" each party shall have the right to appeal to the international commission to investigate and report on the dispute. *Ibid.*, 34.

of the commission is to be completed within one year from the date on which it was begun, unless the time be extended by mutual agreement.[1] The composition of the commission follows the method prescribed by the Second Hague Conference for the selection of arbitration tribunals, except that the selection of members is not restricted in any way.[2] The commission is permanent in the sense that it is constituted in advance; and, moreover, it may act upon its own initiative should the parties fail promptly to have recourse to it.[3] The contracting parties reserve the right to act independently upon the subject-matter of the dispute after the report of the commission has been submitted.[4] These treaties are, therefore, to be distinguished from the earlier general arbitration treaties both by reason of the comprehensive scope of the obligation incurred, making no exception of questions affecting honor or vital interests or of non-justiciable disputes, and by reason of the absence of an obligation to abide by the report of the commission. The principle underlying their adoption was that if it was impossible to secure an unlimited agreement to accept the binding award of an arbitral tribunal, there was nothing to prevent an unlimited agreement at least to consider the report of an impartial body upon all aspects of the case, involving both laws and facts alike.[5]

Provisions of the Covenant of the League of Nations

Procedure by resort to a commission of inquiry reappears in a different form in the Covenant of the League of Nations. Article 12 of the Covenant imposes a binding obligation upon the members to submit a dispute between them either to arbitration or to inquiry by the Council, and it is agreed by the members in no case to resort to war until three months after the award by the arbitrators or the report by the Council. The obligation to submit to the Council any dispute which is likely to lead to a rupture, and which is not submitted to arbitration, is reaffirmed in Article 15, which contains detailed rules of procedure in the event that the alternative of a submission of the dispute to the Council is chosen. The Council is given general authority to endeavor to effect a settlement. If its proposals are accepted, it is to make a public statement setting forth the facts of the dispute and the terms of settlement, as it may deem appropriate. If the dispute is not settled by this means the Council must, either unanimously or by majority

[1] Art. III, treaty with Great Britain.
[2] Art. II. [3] Art. III. [4] Art III.
[5] For further discussion of the purpose and scope of the Wilson-Bryan treaties, see *Am. Journal*, X (1916), 882-892; *Treaties for the Advancement of Peace*, Introduction by J. B. Scott.

CHAP. XXIV

vote, publish a report of its findings as to the facts and of its recommendations in regard to them. Should this report be unanimous, not including the vote of the parties to the dispute, the members of the League agree not to go to war with a state which complies with the recommendations of the report. Should the report not be unanimous, the members reserve the right to take such action as they consider necessary for the maintenance of right and justice. The jurisdiction of the Council does not extend to matters which, in its judgment, belong by international law to the domestic jurisdiction of one of the parties, should the latter claim exemption on that ground.[1] Finally, the dispute may be referred from the Council to the Assembly, whether upon motion of the Council itself or of either party to the dispute, in which case the obligation arising from a unanimous report of the Council is to be made dependent upon a report concurred in by the representatives (in the Assembly) of the states that are members of the Council, together with a majority of the other members of the League.

i. Technical distinctions

The various forms of procedure provided for the pacific settlement of international disputes may be disentangled from their present confusion if the three chief issues involved be taken separately and the particular form of procedure be tested in respect to each of them: (1) How far is resort to a given form of procedure legally obligatory? (2) Is the award of the commission or tribunal legally binding? (3) Is the composition of the tribunal determined by the free choice of the parties or by the community of nations as a body? Procedure in pursuance of bilateral treaties has involved an unqualified obligation on the part of some states to arbitrate, a qualified obligation on the part of others; the award being in both cases binding and the tribunal being freely chosen for each particular case. The limited group of Wilson-Bryan treaties shows an unqualified obligation to submit disputes to investigation and report, the report not being binding and the tribunal being selected by the parties, although not for each particular case. Procedure by general international agreement involved, in the case of the conventions of the First and Second Hague Conferences, a qualified obligation to arbitrate before a tribunal freely chosen from a prescribed, though large, list. In the case of the proposed Judicial Arbitration Court it involved an optional sub-

[1] The question as to a matter "which by international law is solely within the domestic jurisdiction" of a state was at issue in the French and Tunisian nationality decrees controversy. Above, p. 167, n. 2.

mission to a previously constituted tribunal established by the community of nations as a body. In the case of the new Court of International Justice it likewise involves optional submission to a permanent court not controlled by the parties, but permits the obligatory submission of an enumerated group of disputes under special agreement between the members of the League taken severally. Finally, the procedure of the Covenant of the League of Nations involves as an alternative to arbitration a compulsory submission of the dispute to the Council or to Council and Assembly combined, accompanied by an obligation to submit to the report of the Council or of the Council and Assembly according to the unanimity or majority in these bodies.

CHAPTER XXV

FORCIBLE PROCEDURE BY METHODS FALLING SHORT OF WAR

a. Legal status of such procedure

Failing a resort by the contending parties to one or other of the methods of settlement by mutual agreement enumerated above, international practice has given its sanction to a number of methods by which a state may bring physical pressure to bear upon the opposing party without actually resorting to war. These methods, less drastic than war, have been accepted by international law as legitimate measures of self-help.[1] Beyond that, no rules have been developed in respect to their application between the parties themselves.[2] In so far, however, as certain of them, such as pacific blockade, may encroach upon the rights of states not parties to the dispute, a few rules have been worked out governing the relations between the state taking such measures and third states.

b. Retorsion

Retorsion is a form of procedure by which the injured state retaliates in kind as a means of coercing the offending party to desist from certain specific acts. As a rule, it is resorted to where the acts complained of do not constitute a legal ground of offense, but are rather in the nature of unfriendly acts done primarily in pursuance of legitimate state interests, but indirectly hurtful to other states.[3] The offense is therefore comparable to an act causing *damnum sine injuria*, a loss where no legal wrong has been done, in municipal law. While the older conception of retorsion is that of retaliation in kind,[4] certain writers include also within the term other forms of coercion, such as a display of force, or the actual use of force without a declaration of formal war.[5] Resort to retorsion is chiefly had in connection with discriminatory tariffs,

[1] That is to say, the international community has acquiesced in the results of such measures, and thus given a negative recognition to them.

[2] Query, whether the attempt to regulate them would not give a greater degree of international sanction to the use of coercion by strong states against weak states. In the case of war itself the need of regulation is imperative, whatever implied sanction of war the laws of war may involve.

[3] For example, the application of the Volstead Act to foreign vessels in port. Foreign governments might retaliate by requiring the presence of intoxicating liquors on American vessels when in their ports.

[4] See Vattel, *Droit des Gens* (Eng. trans.), II, § 340.

[5] For example, Westlake, *International Law*, 2nd ed., II, 6-11; more recently, Hyde, *International Law*, II, § 588.

domestic legislation against aliens, port restrictions, and other national legislation not subject to international control. Vattel cites the action of the elector of Saxony in enforcing the law of escheat only against the subjects of those provinces who subjected the Saxons to it.[1] The subject of retorsion belongs on the outskirts of international law, since there are no rules governing the resort to it, apart from the general principle that the acts complained of, not being illegal, do not constitute a just ground of war.

c. Reprisals: earlier forms

The modern procedure of reprisals is a relic of a primitive form of self-help between nations and between their respective citizens. The ancient Athenians were familiar with the practice of ἀνδροληψία, by which compensation for an offense committed upon the person of a citizen by a foreigner might be obtained by the seizure of the person of a fellow-countryman of the offender.[2] During the Middle Ages merchants frequently resorted to the practice of obtaining, where necessary, redress for their losses by seizure of both the person and the property of foreigners whose national relationship to the offender made it equitable that they should make good his delinquencies.[3] In time this practice came to be regulated by governments to the extent of issuing letters of marque and reprisal to the injured individual, who, armed with this official sanction, made capture of the property of citizens of the state which had wronged him or of fellow-countrymen of the individual wrong-doer. These reprisals were known as "special reprisals" and were, in effect, nothing more than private warfare legitimatized by the municipal law of the state.[4]

The modern practice

The procedure of special reprisals is no longer resorted to, and such reprisals as are now practised are put into effect by the state itself, acting either in its own interest or in that of its injured citizen. Moreover, the term has now come to be applied to any form of forcible redress by which a state, without resort to formal war, undertakes to bring the offending state to terms. Reprisals differ from retorsion in that they are generally resorted to in consequence of alleged illegal acts on the part of the offending

[1] *Op. cit.*, II, § 340.

[2] See Philippson, *International Law and Custom of Ancient Greece and Rome*, I, 361; Grotius, *De Jure Belli et Pacis*, Bk. III, Chap. II, § 7.

[3] Walker, *History*, 121, 167, 187. For the origin of the term "reprisal" see Hyde, *International Law*, II, 173, n. 2.

[4] The Constitution of the United States recognizes the existence of the custom by enumerating among the powers of Congress that of issuing letters of marque and reprisal. (Art. I, Sec. 8, par. 11.) There appears to be "no example in the history of the United States of authority for special reprisals." Moore, *Digest*, VII, 122.

CHAP. XXV

state, and in that they are not limited to retaliation in kind, but may take any form of coercion which the state believes to be effective to secure redress.[1] In principle reprisals of the more drastic character are not to be distinguished from acts of war. Their practical justification, however, lies in the fact that they afford to the injured state a measure of immediate redress, and at the same time they avoid the necessity of creating a state of hostilities which might result in consequences more serious than the offense in question would justify.[2] As in the case of retorsion, there are no rules of international law governing the resort to reprisals, other than the obvious rule that if redress be granted the property seized must be restored. It would appear that in many cases the grounds for reprisals would be regarded by public opinion as adequate grounds for a declaration of war, should the injured party choose that form of redress. In so far, however, as reprisals might have the effect of restricting the rights of third states, international law has stepped in to forbid any such extension of their scope beyond their immediate purpose.[3]

d. Embargo

With the disappearance of special reprisals by the beginning of the nineteenth century, a form of general reprisals frequently resorted to by states was that of laying an embargo upon all vessels of the offending state that happened at the time to be in the ports of the state seeking redress. Such procedure must be distinguished from the embargo formerly placed upon ships of the enemy in port at the outbreak of hostilities, which was, in law as in fact, an act of war. Embargo by way of reprisal did not contemplate confiscation, except in the event that redress for the injuries suffered should be finally refused. Until recent times, if redress were granted, the vessels seized by way of security were thereupon released; if redress were refused and war broke out between the two states it was the custom to confiscate the property as prize of war. In the case of the *Boedes Lust*,[4] decided in 1803, it was stated by the court that a seizure of Dutch property under the embargo of 1803 was "at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, and so terminated. . . . On the contrary, if the transaction ended in hostility, the retroactive effect

[1] For the past practice of the United States, see Moore, *Digest*, VII, § 1096; Hyde, *International Law*, §§ 590-591.

[2] Query, however, whether reprisals themselves have not frequently been the precursor of war. See Moore, *op. cit.*, VII, 126, quoting Senator Clay.

[3] See Westlake, *Collected Papers*, 590, "Reprisals and War."

[4] 5 C. Rob., 233 (1804). Scott, *Cases*, 497; Evans, 374.

is exactly the other way." It is not clear to what extent this customary rule has been modified by the provisions of the Convention Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, adopted at the Hague Conference of 1907.[1] The convention makes no special reference to the case of vessels seized as security before the time when the declaration of war was decided upon. In general, reprisals by means of embargo have been less frequently resorted to during the past fifty years, since the invention of more direct means of communication between states has made it possible to obtain more prompt redress or a more definite statement of policy from the offending state.

Seizure of vessels on the high seas

The practice of laying an embargo upon vessels of the offending state has at times been accompanied by the seizure of such vessels on the high seas as were encountered by the armed ships of the state demanding redress. In the case of the reprisals of Great Britain against the Two Sicilies in 1839, undertaken on account of the alleged violation of treaty rights, an embargo was laid upon ships flying the flag of the offending state, and at the same time orders were given to the British navy to seize all Neapolitan and Sicilian ships which might be met with in their national waters. Upon grant by the Two Sicilies of redress, the vessels under detention were restored to their owners.[2] As late as 1908 Holland put into effect reprisals against Venezuela for the seizure of certain Dutch vessels, and for the dismissal of the Dutch minister, by the capture of two public vessels of the latter country. The vessels were released when a new president of Venezuela made redress.[3]

Suspension of treaties

In addition to the seizure of property of the offending state, reprisals have taken the form of a suspension of the operation of treaties granting privileges to the offending party. In 1780 Holland's repudiation of its treaty obligation to assist Great Britain when attacked was followed by the latter's suspension of the stipulations providing for freedom of navigation and commerce between the two countries.[4] In 1798 the United States Congress, by way of reprisal for the illegal capture of American vessels, passed an act suspending commercial intercourse with France.[5] Again

[1] For the text of the convention, see *Hague Conventions*, 141. See below, p. 506.

[2] Hall, *International Law*, § 126.

[3] See *U. S. Foreign Relations*, 1909, 630 ff., where the response of the United States to the inquiry of Holland as to the attitude of the former toward coercive measures is given.

[4] Hall, *International Law*, § 120.

[5] Act of June 13, 1798. 1 *Stat. at Large*, 565.

CHAP. XXV

in 1807 Congress established a general embargo on all shipping, foreign and domestic, in the ports of the United States, making exception in favor of the departure of foreign ships in ballast.[1] A Non-Intercourse Act followed in 1809 prohibiting commerce with France, England, and their colonies.[2]

e. Pacific blockade

During the second quarter of the nineteenth century the larger states developed the practice of instituting a pacific blockade as a means of putting coercion upon weaker states. Pacific blockade differs from hostile blockade only in respect to the absence of a formal state of war and in respect to the relations of third states to the blockade. When resorted to upon political grounds—that is to say, when the blockading state has no direct legal ground of offense against the blockaded state, but is acting in pursuance of national interests above the law—pacific blockade is commonly classed as "intervention."[3] But in object and in form it is, none the less, tantamount to reprisals. In 1827 Great Britain, France, and Russia, without declaring war upon Turkey, brought pressure to bear upon that state in the interest of the independence of Greece by blockading those parts of the Greek coast in occupation of the Turks.[4] Even the subsequent battle of Navarino was fought without the acknowledgment of a state of formal war. In 1832 Great Britain and France blockaded the coast of Holland with the object of coercing that state to recognize the independence of Belgium.[5] In 1886 the Great Powers blockaded the Greek coast to prevent that country from going to war with Turkey, and again in 1897 the Great Powers blockaded the coast of Crete to prevent the island from annexing itself to Greece.[6] During the First Balkan War of 1913 the Great Powers blockaded the port of Antivari to prevent Montenegro from annexing a portion of Turkish territory which the blockading powers believed should be attached to Albania. A last instance of such intervention is to be seen in the blockade by the Allied Powers of certain ports of Greece in 1916

[1] Act of December 22, 1807. 2 *Stat. at Large*, 451.

[2] Act of March 1, 1809. 2 *Stat. at Large*, 528. For the effect of the several acts, see Moore, *Digest*, VII, § 1099. These acts must be distinguished from such measures as the act of March 14, 1912, by which Congress authorized an embargo upon the shipment to Mexico of arms and ammunition manufactured in the United States, the object of which was not to make reprisals upon Mexico, but to maintain better the neutrality of the United States during the civil conflict in Mexico. See below, p. 567.

[3] See above, pp. 150 ff.

[4] For details, see Hogan, *Pacific Blockade*, 73 ff.

[5] For details, see *ibid.*, 80 ff.

[6] *Ibid.*, 126 ff., 142 ff. Moore, *Digest*, VII, 138, 139.

with the object of preventing that state from joining forces with the Central Powers.

Cases of reprisals in the strict sense are to be seen in the blockade of the Greek ports by Great Britain in 1850 as a means of securing redress for an attack upon the house of an English subject, Don Pacifico.[1] This blockade has been generally condemned by authors on the ground that it was resorted to before recourse had been had by Don Pacifico to the Greek courts.[2] In 1902 Great Britain, Germany, and Italy blockaded the coast of Venezuela as a means of coercing that state to settle outstanding claims of their respective citizens;[3] but in this case it is not clear whether the blockading powers were not actually at war with the blockaded state.

Its effect upon the commerce of third states

Though condemned by some publicists as a form of international procedure, practice has now given to pacific blockade a definite legal standing. There are, however, no rules of law governing the conditions under which recourse may be had to it. As to the effect of a pacific blockade upon the commercial intercourse of third states with the blockaded state, it would appear that the earlier blockades at times included the ships of third states in the restrictions imposed, whereas later blockades, such as that of Greece in 1886, were as a rule applied only to ships of the blockaded state.[4] In 1902 the United States announced, in anticipation of the blockade of Venezuela, that it refused to acquiesce "in any extension of the doctrine of pacific blockade which may adversely affect the rights of states not parties to the controversy, or discriminate against the commerce of neutral nations."[5] It was in view, however, of the fact that a blockade could be of little value if it did not interfere with the commerce of third states that Hall argued that blockade was "essentially an incident of war," and that it could not be defended on the basis of general principle.[6] As matters now stand, the discussion of the rights of third states still

[1] See Oppenheim, *International Law*, II, § 35.

[2] See *ibid.*

[3] For details see Moore, *Digest*, VII, 140; *U. S. Foreign Relations*, 1903, 420 ff.; Stowell and Munro, *Cases*, II, 7.

[4] The blockade of Crete in 1897 was exceptional in the restrictions placed upon the commerce of neutral ships. For the protest of the United States, see Moore, *Digest*, VII, 139.

[5] *Ibid.*, 140. See also VI, 586-592. For the collateral question as to the preferential treatment accorded to the claims of the blockading powers, see Award of Tribunal of Arbitration, February 22, 1904. Scott, *Hague Court Reports*, 56; Wilson, *Hague Arbitration Cases*, 34.

[6] *International Law*, ed. 1883, § 121. This view was modified in later editions.

CHAP. XXV

rests upon general principle, the argument being made, on the one side, that third states should not be made to suffer without fault by measures of self-help put into effect in time of peace, and, on the other side, that peaceful blockade is useful as an alternative to war, and that if the blockading power could not restrict the intercourse of third states there might be a tendency on its part to declare formal war.[1] It would appear that it was the protest of third states against the pacific blockade of Formosa in 1885 that led France to declare war upon China, and that Great Britain, Germany, and Italy declared their blockade of Venezuela in 1902 to be a war blockade with the object of enforcing it against the vessels of third states.

f. Other forcible measures of redress

In addition to pacific blockade, states have at times had recourse to other forcible measures of redress which differed only from acts of war by the absence of formal hostilities. In 1854 an American warship twice bombarded Greytown, Nicaragua, and finally destroyed the town by fire as reprisals for the failure of the authorities to grant the redress demanded.[2] In justification of such exceptional action, President Polk offered the fact that the community was no more than a "piratical resort of outlaws." In 1858 the United States despatched a naval fleet to the River Plate with the object of making a demonstration which would facilitate the settlement of claims against Paraguay.[3] In 1895 British forces occupied the custom house and other public buildings in the port of Corinto as a means of coercing Nicaragua to pay the indemnity demanded.[4] A conspicuous instance of reprisals was the occupation by United States naval forces of the city of Vera Cruz in 1913 as a means of compelling the Mexican Government to grant specified redress for the arrest of an American officer and seaman in the port of Tampico.[5] The resolution of Congress of April 22, 1914, authorizing the President to use the armed forces of the United States "to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United

[1] The issues are discussed at length by Westlake, *Collected Papers*, 572 ff. See also Oppenheim, *International Law*, II, §§ 44-49. Hyde is of the opinion that "the assertion that the right to coerce a delinquent State by means of a pacific blockade embraces incidentally the right to interfere with vessels of third States" is at variance with sound principle. *International Law*, II, § 592. For the constructive proposals formulated by the Institute of International Law in 1887, see *Resolutions*, 69.

[2] Moore, *Digest*, VII, § 1168.

[3] *Ibid.*, § 1092. For other examples of the display of force, see *ibid.*, § 1091.

[4] *Ibid.*, § 1096.

[5] For further details, see Hyde, *International Law*, II, § 591.

States'' exhibits the paradoxical nature of reprisals in announcing ''that the United States disclaims any hostility to the Mexican people or any purpose to make war upon Mexico.''

More recently, the Italian Government, not satisfied with the reply of Greece to its ultimatum of August 29, 1923, bombarded and seized the island of Corfu on the following day. The occupation of the island was explained as indicating not an intention to go to war but merely a desire to obtain a security which would make it clear to the Greek Government that no trifling would be permitted. The killing of a number of refugees in the fortress was described as unintentional. The island and others adjacent to it were evacuated on September 27.[1]

g. Rupture of diplomatic relations

It should be observed that before resorting to the more extreme forms of reprisals states frequently break off diplomatic relations with the offending state by recalling their public ministers resident at the foreign capital. This measure is in itself not a form of reprisal, since it is not intended to inflict injury upon the offending state, but rather to serve as a warning that the issue between the two states has reached a point where the injured party regards diplomatic negotiations as no longer profitable and is prepared to take active measures of self-help.

[1] For the conditions of the evacuation, see above, p. 392.

CHAPTER XXVI

FORCIBLE PROCEDURE BY WAR

a. Character of war as a legal remedy: the right to make war

The right to make war as an ultimate means of self-help when other measures of redress have failed or offer no prospect of success has already been discussed with respect to the general principle of its legality. It has been shown that international law has concerned itself only in the most abstract way with the question of the causes for which war may be legally undertaken; and that while certain offenses are not regarded as sufficiently grave to warrant a recourse to war, yet under the present restricted scope of international law the circumstances attending a particular dispute may be so complex as to render ineffective any attempt on the part of public opinion to pass upon the merits of the decision taken. In general, therefore, it may be said that states are legally entitled to resort to war as a means of redress when the necessity of doing so seems to them warranted by the importance of the interests involved and justified by the principles of international law as interpreted by themselves individually. That this individual interpretation, however, may not be wholly arbitrary, international law interposes the sanction of general public opinion, supported by the possible armed intervention of states which fear for themselves should the lawbreaker succeed in his arbitrary measures.[1]

War as a procedure and war as a legal relation

As a method of procedure, war consists in the employment of force to reduce the offending party to submission. It is this aspect of war which writers have in mind when they employ the definition of Gentilis to the effect that war is a "contention" or "contest" carried on between two states by means of their armed forces.[2]

[1] That the rule is sufficiently elastic to reduce the distinction between legal and illegal wars to the vanishing point has not kept it from being repeated by statesmen and writers. See above, pp. 383-385.

[2] Oppenheim, for instance, says that "it is universally recognized that war is a *contention*, which means, *a violent struggle through the application of armed force*. For a war to be in existence, two or more States must actually have their armed forces fighting against each other, although the commencement of a war may date back to its declaration or some other unilateral initiative act." *International Law*, II, § 55. See also Lawrence, *Principles of International Law*, § 135. The definition of Gentilis may be found in *De Jure Belli*, Lib. I, Cap. 2. See Walker, *History of the Law of Nations*, I, 252.

On the other hand, the term "war" is used to describe the relationship set up between the parties at war, the state or condition of things resulting from the resort to forcible procedure.[1] This derivative use of the term arises from the fact that international law, while recognizing the right of states to resort to war, has formulated rules governing belligerent procedure which define in detail the respective rights and duties of the contending parties. The state, or status, of war represents, therefore, the new legal relations arising between two or more states engaged in war. The derivative sense of the term "war," it will be seen, is far more comprehensive than the original sense, since it includes not only the rules governing the actual employment of force but rules affecting the fundamental international rights of the two parties as between themselves, as well as their relations to third states. The distinction between the two senses of the term appears further in the fact that war as a state may exist before any act of force has been committed, and may continue after an armistice has been concluded putting an end to the armed conflict.

The "laws of war"

The rules regulating the procedure of war fill an important place in the modern development of international law. The devastation and general misery resulting from the Thirty Years' War forced the nations in 1648 to recognize as fundamental principles the territorial independence and legal equality of the members of the family of nations. These principles, it was hoped, might become the basis of a new and more stable international system; and in point of fact it was around them that there grew up by degrees a body of substantive rules defining the rights and duties of nations within certain restricted spheres.[2] This development of the substantive law was accompanied by a corresponding development of the procedure of war. Statesmen and publicists, unwilling or unable to deny to states at variance the right to maintain their claims by force, sought at least to regulate what they could not, or would not, abolish.[3] Thus there grew up a body of restrictions

[1] Such was the conception of Grotius, who rejected the view, quoted from Cicero, of war as a contention, and held that usage applied the term not to an action but to a status. *De Jure Belli et Pacis* (Eng. trans.), Bk. I, Chap. I, § II. See also Lieber's definition of public war as "a state of armed hostility between sovereign nations or governments" in *Instructions for the Government of Armies of the United States in the Field*, No. 20. The distinction between the two senses in which war is taken is adverted to by Moore, *Digest*, VII, § 1100.

[2] See above, pp. 19 ff.

[3] Grotius gave as his reason for writing his treatise that he "saw prevailing throughout the Christian world a licence in making war of which even barbarous

CHAP. XXVI

and limitations upon the methods of warfare, which in their nature and scope reflected at successive periods the parallel growth of the substantive law. The development of these "laws of war" as between the belligerents themselves was, moreover, greatly furthered by the more effective assertion by third parties of their rights of neutrality. Modern international law thus finds itself divided into two separate and distinct branches, the one constructive in character, dealing with the normal rights and duties of states, the other procedural in nature, defining the relations between states which have resorted to force to maintain disputed claims. It has been common with authors to classify the two branches of the law as the "law of peace" and the "law of war."[1] But while this classification represents the fundamentally distinct character of the two branches of the law, it fails to indicate the relations between them, and the fact that the second is a form of procedure for the enforcement of the first.[2] By presenting war side by side with pacific methods of procedure it is possible not only to obtain a more correct understanding of its true nature, but to estimate more accurately the conditions under which pacific methods of procedure have been set aside as inadequate, and the extent to which the abolition of war as procedure is dependent upon the further constructive development of the substantive law of peace.

Special aspects of war

Two important aspects of war as a legal procedure remain to be noticed. In the first place, since international law does not undertake to pass in advance upon the wrongs which constitute a just ground of war, both parties in a particular war are regarded as being in an identical legal position and are held to be possessed of equal rights of belligerency.[3] So long as the possible condem-

nations would have been ashamed; recourse being had to arms for slight reasons or for no reason; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint." *De Jure Belli et Pacis* (Whewell's trans.), Prolegomena, § 28. The first two books of the treatise are devoted to a discussion of the substantive rules of law, under the caption of "what constitutes a just war"; the last book discusses lawful methods of warfare.

[1] See, for example, the treatises of Westlake, Oppenheim, and Lawrence.

[2] The conception of war as procedure is, however, implied by many modern writers even where not explicitly set forth. See, e.g., Hyde, *International Law*, II, § 596.

[3] The rule as stated by Vattel still held good in 1914. "Since, therefore," he said, "Nations are equal and independent, and can not set themselves up as judges over one another, it follows that in all cases open to doubt the war carried on by both parties must be regarded as equally lawful, at least as re-

nation of public opinion does not take the form of actual intervention in the conflict, the two belligerents not only may claim the same rights in respect to measures directed against each other, but may interfere to an equal degree with the commerce of third states. In the second place, the effects of war frequently transcend the original grounds of the conflict, and involve demands on the part of the victorious state more than commensurate with the redress alleged to be sought. The reason for this is the fact that the procedure of war involves not only a grave risk on the part of the state resorting to it, but such serious loss of life and derangement of domestic conditions that the successful belligerent is justified in making use of the opportunity to prevent a future recurrence of the same necessity.[1] The terms of peace, therefore, bear only such relation to the causes of the war as the victorious state may think expedient in the light of the desirable relations of the two states in the future and the sanction of international public opinion.

Civil war

Speaking strictly, the international law of war holds only between states that are members of the international community. Consequently, should a part of a state, whether province or colony, arise in rebellion against the existing *de jure* state organization, the contest between the two bodies need not assume any other aspect than that of a domestic insurrection, to be put down by the *de jure* government in such manner as seems best under the circumstances. When, however, the contest assumes such proportions that third states are necessarily affected, the community in revolt may be recognized as a belligerent and thereby become entitled to the rights, as well as obligated to the duties, of a belligerent state.[2] The same is true of a body of insurgents who, without seeking to break up the territorial organization of the state, attempt to overthrow the *de jure* government. When recognition of the belligerency of the rebels is given by the *de jure* government, third states as a rule accept the situation with its resulting inconvenience to themselves. On the other hand, third states will at

gards its exterior effects and until the cause is decided.'' *Droit des Gens* (Eng. trans.), Bk. III, § 40. For the effect of the Covenant of the League of Nations upon the old rule, see above, p. 381.

[1] ''If war has once broken out,'' says Oppenheim, ''the very national existence of the belligerents is more or less at stake. The risk the belligerents run, the exertion they make, the blood and wealth they sacrifice, the reputation they gain or lose through the changing fortune and chances of war—all these and many other factors work or may work together to influence the ends of a war so that eventually there is scarcely any longer a relation between them and the causes of war.'' *International Law*, II, § 66.

[2] See above, p. 108.

CHAP. XXVI

times themselves grant recognition of belligerency—as in the case of Great Britain with respect to the Confederate States in 1861—when the measures taken by the *de jure* government encroach upon their normal rights of commerce.[1]

Sources of the law of war: custom

The sources of the law of war are, as in the case of the substantive part of international law, on the one hand the customary principles announced by states and the conduct actually practised by them, and on the other hand the several international conventions that have been adopted covering special fields of belligerent relations. In two respects, however, custom and convention have a more limited application as sources of the law of war than as sources of the substantive law. In the first place, it is in many cases difficult to judge what practices have received the approval of the international community as a whole. In respect to general principles it may be possible to register a fairly definite customary agreement. But owing to the restricted area of war, involving as a rule only two contending parties, the application of general principles to concrete situations leaves wide room for controversy. Moreover, the external conditions of warfare have changed so rapidly in modern times that rules accepted in one generation may be repudiated in the next, and a valid defense offered upon the principle, *rebus non sic stantibus*. In a number of cases new rules of law have been born of violations of existing custom, which, when the war was at an end, commended themselves as reasonable extensions of the law to meet new circumstances.[2]

Limited force of conventions

In the second place the binding force of the various conventions adopted within recent years regulating the conduct of hostilities and the relations between belligerents and neutrals has been modified in each case by the provision that the particular convention shall be binding upon the signatory powers only if all the belligerents are parties to the convention.[3] The effect of these provisions has been that if, in a war between a large number of states, a single belligerent, as, for example, Serbia in 1914, has failed to sign or, having signed, has failed to ratify, a convention, the entire agreement falls to the ground. In this connection, however, it is important to note that many of the conventions adopted

[1] See above, p. 109.

[2] See, in illustration, the rules of contraband and blockade enforced by the United States against neutrals in 1861. Below, p. 540. Compare, however, the attitude taken by the United States and Great Britain toward submarines, below, pp. 512-517.

[3] See, for example, Article 2 of the Convention Respecting the Laws and Customs of War on Land, adopted at the Hague, 1899 and 1907.

at the two Hague conferences codify to a greater or lesser extent existing rules of customary law; so that even should the convention as such cease to be binding, many of its specific provisions will continue to possess the force they originally had as customary law. Thus the whole conduct of belligerent operations during the World War must be judged by a standard determined by what was believed to be already obligatory in 1907 and 1908 when the new codifications of the laws of war were being drawn up. It may be observed that the discussions attending the drafting of these codifications throw valuable light upon the content of the customary law as understood at the time. Owing, however, to the uncertainty attending the rules of customary law, and to the difficulty of sifting custom from unratified and non-obligatory convention, the whole international law of war remains in a state of flux, and the attempted definition of it in the following pages will be accompanied by qualifications and restrictive conditions which will appear little consistent with the term "law."[1]

Sanctions of the laws of war

The sanction of the laws of war is similar in most respects to the sanction applicable to the substantive rules of international law. In so far as concerns the general conduct of the belligerents, respect for the law is maintained by their regard for neutral public opinion, which in time of war is generally more watchful and acute than in time of peace. When, however, one of the belligerents resorts to practises which the other believes to be flagrantly illegal and neutral public opinion is of no avail as a present remedy, the second belligerent may resort to reprisals as a means of bringing pressure upon the offending state to discontinue its illegal conduct.[2] The separate rules dealing with the relations of belligerent and neutral states is specially sanctioned by the active interest which neutral states have in resisting any extensions by the belligerents of their acknowledged right to interfere with neutral commerce.[3] While, therefore, the history of international relations records the constant tendency of belligerents to overleap the restrictions placed upon them, it also records the restraining influence on the one hand of the fear of reprisals and on the other hand

[1] The inconsistencies, both logical and moral, of the laws of war, have led many publicists to denounce the attempt to define these laws or to be concerned with their application in the future. Niemeyer, for example, in his recent handbook, relegates the law of war to an appendix. *Völkerrecht* (1923). It is the function, however, of a treatise on positive law to set forth existing rules irrespective of considerations bearing upon their moral or social value.

[2] For a discussion of the nature and scope of reprisals, see below, p. 489.

[3] See below, p. 528.

CHAP. XXVI

of the active intervention of neutral states in defense of their rights of commerce.

b. Fundamental principles of warfare: limits to the use of force

The laws of war consist, in general, in the limits or bounds set by international law within which the force required to coerce the enemy must be exercised. What these bounds are is prescribed both in general principles and in concrete rules of warfare. First of all, there is the principle that the procedure of war is a means to an end. It follows that the measures employed must have a direct or indirect relation to the desired coercion of the enemy. It is this relation of means to an end which constitutes the traditional "military necessity" in time of war.[1] In no case may the force used exceed the necessities of the situation or be directed to any other object than the submission of the enemy. To continue warfare after the enemy state has announced its willingness to surrender would be in clear violation of the law. This general principle, while undoubtedly a rule of international law, as evidenced by the consistent assertions of statesmen and publicists,[2] leaves room for great latitude of interpretation. Experience has shown that from the very nature of force, as applied between two belligerents of approximately equal strength, it is impossible to define in any exact way the varying degrees of force that may be employed under the particular circumstances of each war. Consequently, apart from the specific rules that have obtained recognition, the application of the general principle to concrete situations has been left to the individual judgment of military commanders.

The laws of humanity

Associated with the principle that the measure of force used must not exceed the necessities of the situation are certain "laws of humanity," which, being based upon the universal dictates of public morality, have been incorporated into the code of international law. In general, these laws or principles prescribe that belligerents must refrain altogether from certain measures of coercion which by reason of their extreme cruelty or their violation of good faith would destroy the very foundation of human relationships and make the return of peace impossible.[3] Again, they

[1] For the special sense attributed to this term by modern German writers, see below, p. 436.

[2] See, for example, the definition of "military necessity" given by Lieber, *Instructions for the Government of Armies of the United States in the Field*, Nos. 14-16.

[3] That the line between what is and what is not "extreme cruelty" has not been drawn at all times logically does not affect the existence of a general recognition that a line should somewhere be drawn and the fact that in specific cases it has actually been drawn.

prescribe that other measures which are regarded as permissible must be carried out in such a manner as not to inflict needless suffering upon the non-combatant population. A minimum of suffering is, in fact, inevitable in consequence of the practical impossibility of dissociating completely the armed forces of the enemy from the civilian population. Beyond that minimum the laws of humanity forbid a commander to take measures which, while to some degree effective in overcoming the resistance of the enemy, would inflict suffering out of all proportion to the military object attained by them. "Humane warfare," while seeking to overcome the resistance of the enemy state, still regards it as composed of human beings whose general rights of life and security are not wholly forfeited because of their resistance, direct or indirect, to the forcible measures of redress applied to them.

Absolute and conditional prohibitions

While the principles of humanity have still a recognized place as abstract rules of conduct, certain applications of them have taken definite shape in the form of accepted usages of war. To these usages must be added further rules based upon international conventions. The result is that, on one hand, the law of war contains a number of *absolute* prohibitions which forbid the use of certain measures under all circumstances, no matter what the necessity of the situation. In this class are the rules which forbid the poisoning of wells, the killing of prisoners, or the misuse of flags of truce. On the other hand, there are *conditional* prohibitions, which restrict the use of permissible measures under certain circumstances. These prohibitions deal generally with cases in which the particular measure of force appears to offer no military advantage, or an insignificant military advantage, in comparison with the suffering it would entail upon the non-combatant population. The conditions attached to these prohibitions leave a greater or lesser latitude of interpretation to the individual belligerent, being generally expressed in the phrase, "so far as the conduct of military operations permits."[1]

The law of necessity

Both the absolute and the conditional prohibitions imposed upon belligerents by the laws of war appear to take into account exceptional cases in which a commander is justified in disregarding

[1] See, for example, *Instructions*, No. 19, where it is held that "commanders, wherever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences." The rule reappears as No. 217 of *Rules of Land Warfare*, published by the War Department of the United States.

CHAP. XXVI

a rule of law when the observance of it would endanger the safety of his army in a grave emergency.[1] This principle, like the law of necessity in municipal jurisprudence, necessarily becomes one of individual interpretation under the particular circumstances presented; and any attempt to formulate it as a general rule would appear to concede to it a wider application than properly belongs to it.[2] During the later years of the nineteenth century certain German writers put forth a theory of "military necessity" (*Kriegsraison*) which included within the term not only the general justification of coercive measures, subject to the restrictions of the law, but the justification of measures in excess of the law when the necessity of the situation called for them.[3] The laws of war thus became mere relative or contingent prohibitions, to be observed or set aside according as they might or might not impede the prosecution of the war. Given any degree of literal application, this principle would reduce the entire body of the laws of war to a code of military convenience, having no further sanction than the sense of honor of the individual military commander or chief of staff and no practical effect where the contending forces were sufficiently equal in strength to render the issue doubtful.[4]

Conflicting views of "humane conduct"

Underlying the conception of "humane conduct" attending procedure which is essentially cruel and severe have been not only sentimental considerations, which have sought to reduce to a minimum the sum total of inevitable suffering, but the more practical consideration that war must not be so fought as to rouse in the defeated enemy feelings of bitterness and distrust which time would not alleviate. Experience has shown that needless cruelty, and particularly violence offered to non-combatants, inflicts deeper wounds than defeat upon the field of battle. International law registers this fact in the customs above referred to. The traditional

[1] Examples would be the killing of prisoners, as by Napoleon at Joppa in 1799, or the refusal to give quarter, or the defiling, other than by poison, of a water-supply.

[2] The principle that "necessity knows no law" must either refer to grave and exceptional emergencies or else contradict the very conception of law. Compare the restricted interpretation of "necessity" in municipal law.

[3] "Military necessity" technically means the necessity of using legitimate measures of coercion to attain the desired end. It has not included those rare emergencies when an army, faced with threat of disaster, has overriden all rules. See, for citation of German authorities, De Visscher, *La Belgique et Les Juristes Allemands, passim.* Also Westlake, *International Law*, 2nd ed., II, 126-128; Oppenheim, *International Law*, II, § 69; Garner, *International Law and the World War*, II, §§ 439-440.

[4] Compare the doctrines laid down in *German War Book* (*Kriegsbrauch im Landkriege*, trans. by Morgan), introduction, 51-55, where the restrictions upon certain methods of warfare are denied the validity of laws.

view of "humane conduct" appears, however, to be questioned by a number of writers and publicists, who regard the tendency to "humanize" war as either futile or inconsistent. On the one hand, it has been argued that a sharp and decisive war is more humane than a prolonged conflict, and that to reach this end means may be employed which, while seemingly inhumane, in fact bring about a return of peace with the least amount of general suffering.[1] Others hold that, as modern wars are conducted, it is as important to break down the moral resistance of an enemy population as to defeat armed forces in the open field or wear out lines of intrenched troops.[2] This latter position is now reinforced by the new conditions of modern warfare which make the term "non-combatants" practically inapplicable to a large part of the civilian population.[3]

Combatants and non-combatants

As a corollary to the principle that war is a means to an end, and that the measures employed must not be extended beyond their effectiveness to secure the submission of the enemy, is the principle that war is primarily a relation between states as represented by their armed forces and persons directly associated with them; so that on one hand the non-combatant population must commit no act of violence toward the invading armies and on the other hand the invading armies must, apart from the operations of war, respect the person and property of unarmed citizens. Certain writers, beginning with Portalis in 1801, have endeavored to uphold the principle that war is a relation between states as such, not between individuals, so that persons included in the fighting forces are enemies only by accident of their combatant character, and other persons not members of the fighting forces are not to be regarded as enemies.[4] This attempt to distinguish between the state

[1] Bonfils, for example, holds that "in time of war humanity can not claim anything incompatible with the object of the war. Whatever should go beyond that would be not only useless, but hurtful. A humanity which sought to obstruct the object of the war would not be a true humanity. There is a measure of truth in the saying of Moltke: 'the most vigorous war is at the same time the most humane war.'" *Manuel de Droit International Public* (6e ed., Fauchille), § 1009. Compare *Instructions for the Government of the Armies of the United States in the Field*, No. 29: "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief." A more extreme view is to be found in the German *Kriegsbrauch*, where it is laid down that "certain severities are indispensable in war, nay more, that the only true humanity very often lies in a ruthless application of them." *German War Book* (Eng. trans. by Morgan), Introduction, p. 55. See also *ibid.*, p. 65, with respect to certain instruments of war, which "just because they attain the object of war as quickly as possible are on that account to be regarded as indispensable and, when closely considered, the most human."

[2] See below, p. 477.

[3] See below, p. 438.

[4] For a citation of opinions, see Hall, *International Law*, § 18.

CHAP. XXVI

and the body of its citizens is, however, at variance not only with the general principle of international law which recognizes the individual only as a member of his state,[1] but with the actual practice of nations, which, while endeavoring to spare non-combatants as far as possible, makes them the indirect victims of sieges, blockades, and other military operations, and holds them to direct responsibility for the indemnities exacted from the defeated state.[2] The modern tendency has been rather in the opposite direction, reverting, though by the use of different methods, to the earlier identification of armies and civilian populations.[3]

Changed conditions of modern warfare

It must be observed that the present confused situation with respect to the binding force of many of the laws of war, whether those based upon custom or those based upon convention, arises from the changed conditions of modern warfare. Many rules, originally possessing a degree of logic, or founded upon a compromise of conflicting interests, have become inconsistent with new situations confronting belligerent states. The invention of more deadly weapons of destruction has raised the issue of the feasibility of restricting any method of putting the enemy out of action, particularly in view of the fact that in a war of opposing trenches, the mere disabling of the individual soldier does not permanently remove him as an active combatant.[4] The general participation of the unarmed population in the manufacture of munitions, and in other services directly contributory to the support of the armies in the field, has tended to abolish the distinction between combatants and non-combatants.[5] Side by side with the clearer defini-

[1] Vattel stated the rule correctly in 1758 in saying that "when the ruler of the State, the sovereign, declares war upon another sovereign, it is understood that the whole Nation is declaring war upon the other Nation; for the sovereign represents the Nation and acts in the name of the whole society, and it is only as a body, as a unit, that one Nation can deal with another." *Droit des Gens* (Eng. trans.), Bk. III, § 70. Compare *Instructions for the Government of the Armies of the United States in the Field*, No. 20: "Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war."

[2] The two points of view are discussed in Westlake, *International Law*, 2nd ed., II, 35-41.

[3] See below, p. 477.

[4] Compare the statement of the Declaration of St. Petersburg of 1868, "that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men." Higgins, *The Hague Peace Conferences*, 5. See below, p. 463. During the World War a large percentage of the wounded returned to their positions in the trenches.

[5] Such appeals of governments to the public at large as that "Munitions will win the war," "Food will win the war," indicate the extent to which workers

tion of the rights and duties of neutral states have grown closer bonds of commercial relationships which have made neutrals more jealous of the traditional restraints upon their intercourse with the respective belligerents. New facilities of transportation have rendered the existing rules of contraband and blockade inadequate. In these and other ways the efforts to codify the laws of war made at the two Hague conferences have been offset by a change of the facts upon which the rule was originally established, and it is open to question whether the principle of *rebus non sic stantibus* has not partially invalidated a number of the most generally accepted rules.[1]

in the factory or field, or families in the home, were believed to be essential contributors to the success of the soldier at the front.

[1] The specific cases in which this issue was raised during the World War will be pointed out below. See pp. 512, 541 ff.

During the war Great Britain and her allies took the position that the existing laws of war applied until changed by general consent. Germany, on the other hand, held that new conditions permitted resort to instruments and methods not contemplated by the existing rules, but consistent with the general principles upon which the specific rule had been based. At the Washington Conference of 1921-22 the contracting parties reaffirmed the validity of the existing law (as of 1914) with respect to the use of submarines and noxious gases, and restricted their use for the future. At the same time they recognized that the "existing rules" might not adequately cover new methods of attack and defense resulting from the introduction or development, since the Hague Conference of 1907, of new agencies of warfare, and appointed a committee to consider what changes ought to be adopted, except in respect to submarines and noxious gases, already provided for. See *Am. Journal*, XVI (1922), 189; XVII, 629.

CHAPTER XXVII

EFFECT OF WAR UPON THE NORMAL RELATIONS OF THE BELLIGERENT STATES

a. Rupture of diplomatic relations

The outbreak of war between two states is regularly attended, if not already preceded, by a rupture of diplomatic relations. International law prescribes that diplomatic agents of the belligerents be given passports to leave the country and be protected in their personal inviolability until they have crossed the frontier. With few exceptions, governments have been scrupulously careful to observe this rule, in spite of the difficulty presented by the hostility of the population.[1] The archives of the embassy or legation are usually turned over to the diplomatic agent of a friendly neutral state, and the functions thus transferred may be assumed by the neutral without offense to the territorial sovereign. It is also customary for a state to withdraw the exequaturs of consuls of the enemy state, after which the consular archives may either be left in the care of a non-official employee of the consulate or be turned over to the consul of a friendly state. As a general rule, enemy consuls have been permitted to return freely to their own state; so that the detention by Great Britain and Germany of each other's consuls in 1914 was exceptional.[2]

b. Effect of war upon treaties

While there is no clear rule of international law with respect to the effect of war upon treaties between the belligerent states, the practice of recent times indicates a tendency to divide treaties into two classes according to their subject-matter, and to hold the one class unaffected and the other class abrogated by the war. Treaties of the class unaffected by war appear to be correctly described by the United States Supreme Court in the case of Society for the Propagation of the Gospel *v.* New Haven,[3] which arose out of an action of ejectment brought by the society, a foreign corporation, to recover lands held by them under the treaty of 1783 between the United States and Great Britain. While recognizing

[1] For instances of alleged mistreatment of diplomatic agents at the beginning of the World War, see Garner, *International Law and the World War*, I, 39-47.

[2] See *ibid.*, 49.

[3] 8 Wheaton, 464 (1823); Scott, *Cases*, 93; Evans, 398.

the title of the society as a vested right under the treaty, irrespective of the effect of the subsequent war, the court announced as an *obiter dictum* the doctrine that "where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war." The same doctrine was laid down by the British court of chancery in 1830 in the case of Sutton *v.* Sutton,[1] which involved the right of an American alien to hold and convey real estate under the treaty of 1794, notwithstanding the intervening war of 1812-14. The court held that it was "a reasonable construction that it was the intention of the treaty that the operation of the treaty should be permanent, and not depend upon the continuance of a state of peace." In 1854 the British Parliament showed its acceptance of the customary rule by refusing to regard a treaty of 1831, by which certain debts of Russia to Holland were to be paid by Great Britain, as abrogated by the outbreak of war in the Crimea, although in this case a special provision of the treaty contemplated its continuance notwithstanding the outbreak of war.[2]

Executed treaties

Treaties of this final and dispositive character are said by most writers to be suspended while the war lasts, but upon the return of peace to revive in their operation without any express or implied renewal. A better view is, perhaps, that the treaty has ceased to be in force from the time of its execution, so that there is no existing contractual obligation to be affected by the war.[3] These treaties have been designated by certain writers as "transitory conventions" (*pacta transitoria*), and while the term is open to objection,[4] it may be interpreted as indicating the fact that such treaties accomplish their object by a single act and thereupon cease to have any further contractual force. A better term might per-

[1] 1 R. & M., 663 (Court of Chancery, 1830); Scott, *Cases*, 468.

[2] Case of the Russo-Dutch Loan, 1854. Cobbett, *Leading Cases on International Law*, II, 38.

[3] See Sir Cecil J. B. Hurst, "The Effect of War on Treaties," in *British Year Book of International Law*, 1921-22, pp. 37, 46. Sir Cecil questions "whether it is the character and nature of the treaty stipulation which is really the decisive element," and submits "that the true test as to whether or not a treaty survives an outbreak of war between the parties is to be found in the intention of the parties at the time when the treaty was concluded." (Pp. 39-40.) Query, whether the character and nature of a treaty are not evidence of intention when not otherwise manifested.

[4] See Moore, *Digest*, V, 383, where it is pointed out that the failure to consider such agreements as treaties in the technical sense resulted in incorrect generalizations with respect to the latter.

CHAP. XXVII

haps be "executed treaties," following the terminology of the "executed contracts" of municipal law.

Political treaties: international conventions

To the above group must be added certain political treaties, such as the treaty of 1907 by which the independence and integrity of Norway were recognized,[1] or the treaty of 1906 fixing the international status of Morocco.[2] Such treaties, having reference primarily to the rights of third states, would appear from their subject-matter to be intended to survive the outbreak of war between any two or all of the contracting parties. Again, it may obviously be inferred from their subject-matter that certain bilateral treaties, such as the treaty of 1795 between the United States and Spain,[3] containing provisions entered into directly in view of war, are not only not abrogated, but in respect to the particular clauses are actually brought into effect by the outbreak of war. The same rule holds, with even greater force, with respect to the general international conventions to which the nations as a body have been parties, including neutral states as well as belligerents, such as the conventions of the Hague conferences relating to the conduct of hostilities and other rights and duties in time of war.[4] Further, there are the general international conventions, such as the International Sanitary Convention of 1903, relating to matters of common convenience to the international community. These treaties continue in force with respect to relations between belligerents and neutrals; and it would appear that in respect to the belligerents themselves they are merely suspended in so far as their operation is inconsistent with belligerent operations and the cessation of friendly intercourse.

Treaties contemplating temporary arrangements

On the other hand the subject-matter of other treaties clearly indicates that they are not intended by the parties to set up final and definitive arrangements, but merely to provide a temporary basis for the adjustment of conflicting interests or for the promotion of common interests. The absence of a time-limit attached to these treaties does not confer upon them any permanent character. International practice has, on the whole, regarded them as abrogated by war between the contending parties. Political treaties, such as treaties of alliance or of arbitration, are necessarily abrogated, as being incompatible with the existence of hostile relations. Treaties of commerce and navigation have almost uniformly been

[1] See above, p. 95, n. 1.
[2] See above, p. 96.
[3] Art. XIII. Malloy, *Treaties*, II, 1640.
[4] See below, Chaps. XXVIII, XXIX.

regarded by states as abrogated by hostilities, although the fact that in the treaties of peace at the conclusion of wars such treaties have occasionally been "confirmed"[1] or "reëstablished"[2] has led writers to assert that they were merely suspended during the war.[3] At the close of the Crimean War of 1854-56, the Franco-Prussian War of 1870-71, and the Russo-Japanese War of 1904-05 the commercial relations of the two belligerents were temporarily adjusted on the basis of "most-favored-nation" treatment until new treaties should be negotiated.[4] At the close of the Spanish-American War in 1898, Spain refused to consider any of the treaties between the two countries as continuing in force; and they were "expressly abrogated and annulled" by the treaty of 1902 with the exception of the treaty of 1834 relating to the settlement of claims.[5]

Treaties containing both permanent and temporary provisions

Where a treaty contains both provisions intended by the contracting parties to be permanent and provisions intended to be temporary, international practice indicates that the former, being "executed" provisions, remain unaffected by war, whereas the latter are abrogated. Of such character was the treaty of 1783 between the United States and Great Britain, which on the one hand recognized the independence of the former colonies and defined their boundaries, and on the other hand granted certain fishing "liberties" to the United States in the waters of Newfoundland. These latter were claimed by the United States in 1815 as surviving the war of 1812-14; but in the face of the categorical assertion by the British Government that it knew of "no exception to the rule that all treaties are put an end to by a subsequent war between the same parties" the United States was obliged to yield the point.[6]

The provisions of the Treaty of Versailles upon this subject are of an exceptional character and represent rather the imposi-

[1] Art. XVII, treaty of 1859 between Austria, France, and Sardinia. *Nouveau Recueil Général*, XVI, P. 2, p. 537.

[2] Art. II, treaty of 1864 between Austria, Prussia, and Denmark. *Ibid.*, p. 475.

[3] For a discussion of opposing points of view, see Hall, *International Law*, § 125; Moore, *Digest*, V, § 779. See also documents on "Effect of War on Treaties," in *Selected Topics Connected with the Laws of Warfare*, by J. R. Baker and L. W. McKernan.

[4] See Crandall, *Treaties: Their Making and Enforcement*, § 181, where a survey of the leading peace treaties is given.

[5] Malloy, *Treaties*, II, 1701, 1710. At the very beginning of the war Spain had announced that the war then existing had terminated all agreements, compacts, and conventions between the two countries. See Moore, *Digest*, V, § 779.

[6] For details of the controversy see Moore, *Digest*, I, § 163. See also above, p. 280.

CHAP. XXVII

Provisions of the Treaty of Versailles

tion of penalties upon the defeated state than the recognition of the legal survival of preëxisting treaties. Numerous multilateral treaties of an economic or technical character were enumerated as to be "applied" between Germany and the Allied and Associated Powers parties to them.[1] Other bilateral treaties between individual members of the Allied and Associated Powers and Germany were to be "revived" at the option of the former, provided they were not inconsistent with the provisions of the treaty then being concluded.[2] All such treaties which had not been so notified to Germany within a period of six months, as revived, were to be considered as forthwith abrogated.[3] Specific penalties were imposed upon Germany in the form of the required cancellation of certain treaties concluded between Germany on the one hand and Austria-Hungary, Bulgaria, Turkey, and Russia on the other.[4]

c. Enemy public property

Under the older law the existence of a state of war had the effect of subjecting to confiscation all enemy property, whether public or private, which might happen to be found in the territory of the other belligerent.[5] The rigor of this rule was gradually modified during the eighteenth and nineteenth centuries, so that at the present day a distinction is drawn between public property of the enemy state and private property of enemy subjects. The former is still subject to confiscation, although it is not often found in the enemy state in large proportions. Moveable property of the enemy state in the form of supplies of ammunition or goods of any kind, invested funds other than bonded debts, the rolling-stock of state railways, public-owned vessels, armed or unarmed, has been confiscated without hesitation.[6] A possible exception to the rule might be found in the case of property of a literary or artistic character; but there is no fixed custom in the matter. The land and buildings of a foreign embassy are also a possible exception. The protest of Austria-Hungary, in addition to that of the pope, in 1916 against the seizure by Italy of the "Venetian Palace" in Rome, occupied by the Austro-Hungarian embassy to the Vatican, was justified by Italy in respect to Austria-Hungary on

[1] Art. 282-287.
[2] Art. 289.
[3] Art. 289.
[4] Art. 290.

[5] Grotius, in his sweeping assertion of the right to confiscate property belonging to the enemy, makes no distinction in respect to the location of the property. See *De Jure Belli et Pacis* (Whewell's trans.), Bk. III, Chap. VI.

[6] The Trading with the Enemy Act of October 6, 1917, left the question of the ultimate fate of confiscated public property of the enemy to the subsequent decision of Congress. Should such property be used to offset claims of private citizens against Germany it could not, technically speaking, be said to be confiscated.

the ground of reprisals.[1] As a measure of restitution for past offenses, the Treaty of Versailles of 1919 required of the German Government that it restore to the French Government the trophies and works of art taken from France by the German authorities during the war of 1870-71.[2]

d. Status of resident enemy aliens

International practice in respect to the treatment to be accorded to enemy aliens residing within a belligerent state has not been sufficiently uniform to permit the inference of clear rules of law. In respect to their personal status, down to the year 1914 the modern practice of states had been to permit citizens of the enemy state to remain within the country, subject to the indefinite condition of good behavior on their part. It cannot be said, however, that states recognized any legal obligation toward one another in this matter, and in any case the right to continue in residence was always subject to the law of military necessity. The right to continue in residence during good behavior was expressly stipulated in a number of treaties, as, for example, in the treaty between the United States and Great Britain in 1794,[3] which provided that merchants and others should have the privilege of remaining "so long as they behave peaceably and commit no offense against the laws," and again in the more recent treaty between the United States and Peru in 1870.[4] In March, 1917, Germany proposed to enlarge the scope of Article 23 of the treaty of 1799 so as to obtain for its citizens in the United States the treatment accorded to neutrals; but the United States was unwilling to agree to the amendment.[5]

Expulsion of enemy aliens

On occasion states have resorted to the expulsion of enemy aliens where the necessity of the military situation was open to question. In 1870 the government of the National Defense expelled German subjects from the department of the Seine as a measure of precaution in the presence of a grave emergency.[6] At the beginning of the Boer War most of the British subjects in residence in the South African republics were expelled.[7] Similar measures were taken by Russia in 1904 against Japanese residents in the Far East

[1] See Garner, "Treatment of Enemy Aliens," in *Am. Journal*, XII (1918), 769. The reply of the Italian Government to the pope raised other issues. See *ibid.*

[2] Art. 245.

[3] Art. XXVI. Malloy, *Treaties*, I, 590.

[4] Art. XXIX. *Ibid.*, II, 1414.

[5] See *Am. White Book, European War*, IV, 415.

[6] For details see Bonfils-Fauchille, *Droit International*, No. 1055.

[7] The necessity of the measure is conceded by Spaight, *War Rights on Land*, 29-31.

CHAP. XXVII

provinces of Russia.[1] Again in 1912, Turkey expelled all but certain classes of Italians from its territories.[2]

Freedom of departure

The earlier practice of detaining enemy aliens, recognized by Grotius as a justifiable means of weakening the forces of the enemy,[3] had been abandoned long before 1914. Vattel wrote in 1758 that it was a point of good faith on the part of a belligerent not to detain enemy subjects who had entered the state under an implied promise of being able to return in freedom and safety.[4] The action of Napoleon in 1803 in ordering the arrest of English subjects of military age in France was generally regarded as in violation of custom, whether or not justified as an act of reprisal.[5] Numerous treaties were concluded during the nineteenth century by which the contracting parties agreed to give from six months to one year for the withdrawal of merchants and others and for the arrangement of their business affairs. The treaty of 1799 between the United States and Prussia specifically mentioned "the merchants of either country then residing in the other."[6] But with the increased growth of standing armies during the second half of the nineteenth century the question of permitting the departure of persons under obligation of military service became more acute, and by the opening of the twentieth century conditions were ripe for a change in the law.

Practice during the World War

Two modifications of existing custom were introduced by the belligerent states immediately upon the outbreak of the war in 1914. In the first place, enemy aliens of military age were detained within the several belligerent states, and were, as a rule, confined in concentration camps to prevent their escape from the country. This action, while in contravention of custom, was demanded by the change of circumstances, and was impliedly justified by the belligerents on that ground. In the second place, numerous regulations were issued by the belligerents, prescribing the conduct to be observed by resident enemy aliens. These regulations imposed a wide variety of restrictions upon the freedom of movement of enemy aliens, required their registration, forbade their

[1] See Hershey, *International Law and Diplomacy of the Russo-Japanese War*, 269, 282 ff.

[2] The right of expulsion as a measure of military necessity was indorsed by the Institute of International Law in 1892. See *Resolutions*, 103.

[3] *De Jure Belli et Pacis* (Eng. trans.), Bk. III, Chap. IX, § IV.

[4] *Droit des Gens* (Eng. trans.), Bk. III, § 63.

[5] See Bonfils-Fauchille, *op. cit.*, No. 1052. Oppenheim, accepting the act of Napoleon as one of reprisal, states that "no instance of the former rule has occurred during the nineteenth century." *International Law*, II, § 100.

[6] Art. 23. Malloy, *Treaties*, II, 1486.

having arms in their possession or instruments of communication or secret codes, and otherwise subjected them to personal disabilities, with the object of preventing intercourse with the enemy or obstruction to the prosecution of the war.[1] In the United States aliens held under detention were brought within the prohibitions imposed upon citizens against communication with the "enemy."[2] The justification of these new restrictions upon resident enemy aliens lay, doubtless, in the modern means of communication which made it possible for the individual to give information and aid to the enemy in ways not possible in wars of the past.[3]

Access to the courts

While international practice down to 1914 tended toward the recognition of an obligation on the part of the belligerents to permit enemy aliens to continue in residence during good behavior, there was a marked difference in the attitude of states toward permitting such persons to maintain civil suits before the courts. The older rule had been that the fact of war put enemy subjects *ex lege*, so that they could have no standing in court. To this rule the British courts, by a decison rendered in 1697,[4] made exception in the case of persons who were in the country under the "protection" of the crown and who had a license to reside and to trade. Later decisions, while insisting upon the general disability of alien enemies to sustain a *persona standi in judicio*,[5] were ready to infer from the continued residence of an enemy alien an implied license of the crown. In the United States, a similar general disability of alien enemies and exception in the case of those in residence was recognized.[6] On the other hand, continental practice favored the recognition of a general right of access to the courts.[7] The difference of opinion came to a definite issue in connection with the interpretation of Article 23 (h) of the Hague Convention respecting the Laws and Customs of War on Land, which forbade bellig-

[1] For the British regulations, see Aliens Restriction Act, August 5, 1914, and Aliens Restriction Order, September 9, 1914. Baty and Morgan, *War, Its Conduct and Legal Results*, 470, 473. For the United States regulations, see Proclamation of War, April 6, 1917. *Am. White Book, European War*, IV, 429.

[2] See Trading with the Enemy Act, October 6, 1917.

[3] For further details, see Garner, *International Law and the World War*, I, Chap. III.

[4] Wells *v.* Williams, 1 L. Raymond, 282 (Court of King's Bench). Scott, *Cases*, 566.

[5] See The *Hoop*, 1 C. Rob., 196 (1799). Scott, *Cases*, 622; Evans, 459.

[6] In Hanger *v.* Abbott, 6 Wallace, 532, for example, the court declared "the total inability on the part of an enemy creditor to sustain any contract in the tribunals of the other belligerent." Scott, *Cases*, 613; Evans, 497.

[7] The Anglo-American attitude is condemned, e.g., by Bonfils-Fauchille, *op. cit.*, No. 1065, and by Despagnet, *Droit International*, No. 517.

erents "to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party." Continental writers held that this applied to resident enemy aliens; British and American writers insisted that it referred to the status of citizens of the enemy state in time of military occupation. In 1915, in the case of Porter *v.* Freudenberg,[1] the British court accepted the latter interpretation, but reaffirmed the right of "interned civilians," as distinct from prisoners of war or other imprisoned aliens, to maintain actions on ground of implied license. In the United States resident enemy aliens were in general excepted from the restrictions upon the right of bringing suit imposed by the Trading with the Enemy Act.[2] It should be observed that the whole subject lies on the outskirts of international law, there being only the inchoate recognition of an international obligation in the matter.[3]

Property of enemy aliens

The law with respect to rights of a belligerent over the property of enemy citizens situated within its territory is in a confused state. Prior to 1914 a distinction was made in the law between the property of resident enemy aliens and the property of enemy citizens resident outside the belligerent state. In the case of resident enemy aliens the law was fairly clear that their property—whether in the form of lands, goods, or choses in action—was not subject to confiscation, though restrictions might be put upon its use to prevent aid being given to the enemy. The protection of such property was provided for in treaties stipulating the right of continuance in residence during good behavior. On the other hand, the property of enemy citizens resident outside the belligerent state was in a more doubtful position. The old rule had been that such property was subject to confiscation, and as late as 1814 the Supreme Court of the United States in the case of Brown *v.* United States,[4] which involved a British-owned cargo brought within the United States upon an American ship, held that the modern rule was that tangible property belonging to an enemy and found in the country at the commencement of war was subject to confiscation, although not actually confiscated until declared so by act of Congress. Such exceptions as had been made, as in

[1] 1 K. B., 857 (Court of Appeals, 1915). Scott, *Cases*, 570; Evans, 512. The case contains a valuable summary of past practice.

[2] The exemption is discussed in Hyde, *International Law*, II, § 612, n. 1.

[3] Details of past practice and of recent decisions may be found in Garner, *International Law and the World War*, I, Chap. V.

[4] 8 Cranch, 110. Scott, *Cases*, 555.

the "universal practice of forbearing to seize and confiscate debts and credits," were a matter of expediency, not of law. On the other hand, in 1817, a British court, in the case of Wolff *v.* Oxholm,[1] held that the confiscation by Denmark of private debts owing to British creditors by Danish citizens was in violation of the law of nations, and that, in consequence, the Danish ordinance did not cancel the debt. Practice of the nineteenth century conformed to the latter view, the only instance of confiscation being the action taken by the Confederate States in 1861, which, however, made exception of "public stocks and securities."[2] It would appear that foreign government bonds have always been regarded as entitled to a specially privileged position owing to the fact that they represent the pledged faith of the state to make good its indebtedness.[3]

Practice during the World War

The question of the immunity of enemy private property on land took on new aspects with the opening of the World War. This was due to the fact that the belligerents found themselves confronted with a situation in which a considerable part of general business was conducted not only by individual enemy aliens but by corporations whose boards of directors were composed in whole or in part of enemy aliens. Moreover, in the severe struggle ahead it was clear that the national resources of each state would be drawn upon to the full, and it was therefore imperative that the property in the possession of enemy aliens should not be used in a manner detrimental to the state. In consequence, Great Britain, by act of November 27, 1914, appointed a custodian of enemy property, whose duty it was to receive, hold, and deal with such property as might be vested in him by the courts in cases where such disposition of the property might be deemed expedient. Provision was further made for the appointment of controllers, whose duty it was to carry on any business, the management of which by an enemy alien might be prejudicial, yet the continuance of which was demanded by the public interest. Similar steps were taken in France and Germany.[4]

Measures taken by the United States

In the United States the Trading with the Enemy Act of October 6, 1917, provided for the issuance of licenses to resident

[1] 6 M. & S., 92 (Court of King's Bench). Scott, *Cases*, 550 (as cited in case of ex-Czar Ferdinand).

[2] See Hall, *International Law*, § 144.

[3] Vattel stated in 1758 that "the State does not even touch debts which it owes to the enemy; money lent to a State is everywhere exempt from confiscation and seizure in case of war." *Droit des Gens* (Eng. trans.), Bk. III, § 77.

[4] See Garner, *op. cit.*, I, §§ 62-71.

CHAP. XXVII

enemy aliens to continue in business, and further authorized the appointment of an alien property custodian with power to receive and hold all money or other property due to alien enemies which might be transferred to him.[1] Subsequent acts authorized the custodian to sell any property in his custody;[2] and a large part of it was disposed of at auction.[3] The ultimate disposal of the proceeds of such sales was not made clear, the primary object of the seizures and sales being to destroy the financial influence of the German owners.[4] By the Treaty of Versailles the Allied and Associated Powers reserved the right to retain and liquidate all property, rights, and interests formerly belonging to German nationals within their territories, to be used for the purpose of compensating their nationals for losses suffered at the hands of the German Government during the war.[5] It will be observed, therefore, that in respect both to the sequestration of enemy alien property and its ultimate disposal the customary law was not adhered to.[6]

e. Status of enemy merchantmen in port

The exemption of privately owned vessels from confiscation in the ports of a belligerent state was not recognized until the middle of the nineteenth century. Earlier practice generally levied an embargo upon such vessels as a measure of reprisals, and confiscated them upon the actual outbreak of war.[7] By the time of the Crimean War the usage developed of permitting enemy merchant vessels, privately owned, to depart from port within a specified time. Subsequent wars showed an adherence to the same practice, and in 1898 the United States recognized the force of the growing practice by providing that Spanish vessels, either in American ports or having departed from American ports prior to the out-

[1] For the text of the act, see *Am. Journal*, XII (1918), Supp., 33.

[2] Acts of March 28, 1918; November 4, 1918.

[3] For the several executive orders, see *Am. Journal, Analytical Index*, sub. tit. "Alien Enemies during the World War: United States."

[4] See Garner, *op. cit.*, I, § 74.

[5] Art. 297. The right of the United States under the Treaty of Versailles was retained in the separate treaty of peace of August 25, 1921. See *Am. Journal*, XVI (1922), Supp., 10. On August 10, 1922, a special executive agreement was entered into between the United States and Germany providing for the creation of a mixed claims commission to determine the amount of Germany's obligations under the treaty of peace. See *ibid.*, Supp., 171. The claims to be estimated include those for injuries to the persons and property of Americans in Germany as well as in the United States. On March 4, 1923, Congress passed the Winslow Act, in the form of an amendment to Section 9 of the Trading with the Enemy Act, authorizing the Alien Property Custodian to release to former enemy owners an amount up to $10,000 of their seized property.

[6] For details of British, French, and German practice, as well as that of the United States, see Garner, *op. cit.*, I, Chap. IV.

[7] See above, p. 422.

break of war (April 21, 1898), were to be permitted to discharge their cargoes and depart "without molestation" within thirty days from the commencement of hostilities.[1] The Second Hague Conference attempted to give statutory force to the existing usage by the adoption of the Convention (VI) relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities. The provisions of the convention suggest, however, that the powers were not ready to regard the usage as a rule of customary obligation, for the convention merely prescribes that when a merchant ship belonging to one of the belligerent powers is found, at the commencement of hostilities, in an enemy port it is "desirable" that it should be allowed to depart freely, either immediately or after a certain term of grace.[2] Moreover, the convention permits the belligerent to detain a merchant vessel without payment of compensation, but subject to the obligation of restoring it after the war; or the belligerent may requisition the vessel on payment of compensation.[3] Further, the provisions of the convention do not apply to merchant ships whose build shows that they are intended for conversion into warships.[4]

Exemption after departure

As a corollary to the usage of allowing days of grace to enemy merchant vessels in port, the practice had grown up of exempting such vessels from capture on the high seas while returning to their home ports. Further, such merchant vessels as had left their home ports before the outbreak of war and were in ignorance of the opening of hostilities were to be permitted to enter the belligerent port, and after discharging their cargoes to depart freely. In the case of the *Buena Ventura*,[5] the Supreme Court of the United States went so far as to extend the benefit of the President's proclamation of April 26, 1898, relative to vessels in port or others subsequently arriving, to a Spanish vessel which had left an American port before the war had begun. The Hague

[1] Presidential proclamation, April 26, 1898. *U. S. For. Rel.*, 1898, 722; Moore, *Digest*, VII, 454.

[2] Art. 1. Certain authors, e.g., Hershey, *Elements of International Law*, speak of the convention as a "step backward," but it is doubtful whether the existing usage had become sufficiently general to obtain the force of a legal obligation; and in any case the radical change of conditions would have destroyed the obligation in respect to vessels susceptible of conversion into warships. In support of the criticism it should be observed that the United States refused to sign the convention on the ground that its provisions represented an unsatisfactory compromise and were less progressive than the practice that had been growing up since the Crimean War.

[3] Art. 2.

[4] Art. 5.

[5] 175 U. S., 388 (1899).

CHAP. XXVII

Convention of 1907 followed the existing usage in exempting from confiscation, though not from requisition, vessels which had entered a belligerent port in ignorance of hostilities.[1] Moreover, it provided that vessels which had left their last port of departure before the commencement of war and were encountered on the high seas while still ignorant of the outbreak of hostilities should not be subject to confiscation.[2] To this provision Germany entered a reservation based upon its general policy with respect to the capture of merchant vessels on the high seas. The resulting situation is illustrated by the case of the *Perkeo*,[3] in which the British court held that a German vessel which had left the port of New York for Hamburg in July and was captured off Dover on August 5 in ignorance of the state of war was not entitled to the privileges of Article 3 in consequence of the reservation entered by Germany. In two other cases, those of the *Moewe* [4] and of the *Fenix*,[5] the British and German courts respectively gave a narrow interpretation of the term "port" as used in Articles 1 and 2 of the convention, and excluded from the privileges of exemption from capture vessels which were in territorial waters but were not technically "in port."

Practice during the World War

While the Hague Convention, in consequence of the failure of the belligerents to ratify it, was not technically binding upon the belligerents at the outbreak of war, there was behind it the older customary rule approximating in force to a legal obligation. The belligerents were, however, uncertain as to the extent to which it would be regarded as binding, and sought by an immediate exchange of inquiries to provide for a reciprocal release within a brief period of enemy merchant vessels, with the exception of specified kinds. The attempt failed in the case of Great Britain, France, and Germany, with the result that vessels in port were forthwith detained and requisitioned. Reciprocal treatment was, however, arranged for as between Great Britain and Austria-Hungary, and their vessels were allowed the specified days of grace. The customary rule was observed as between Japan and Germany.[6]

Upon the outbreak of war between the United States and Germany the United States found itself in possession of a large number of interned merchant vessels. By Article XXIII of the treaty

[1] Art. 1. [2] Art. 3.

[3] *Br. and Col. Prize Cases*, I, 136; Stowell and Munro, *Cases*, II, 43.

[4] 31 *Times Law Reports*, 46; *Br. & Col. Prize Cases*, I, 60.

[5] A translation from the German report is given in *Am. Journal*, X (1916), 909.

[6] For details, see Garner, *op. cit.*, I, Chap. VI.

of 1799 between the United States and Prussia, renewed by Article XII of the treaty of 1828, resident merchants of the contracting parties were to be allowed to depart freely with their effects. Neither side, however, appeared to regard the provision as applicable to vessels,[1] and on May 12, 1917, Congress authorized the President to take over enemy merchant ships within the jurisdiction of the United States and to operate them or otherwise put them into service. The terms of the law failed to indicate whether this temporary arrangement would result in the ultimate confiscation of the vessels or in their requisition subject to compensation. That the action of the United States was in contravention of the existing usage to which it had given its adherence in 1898, and which it had designated in 1907 at the Hague as the progressive rule, is indisputable.[2] Whether the action was justified by the circumstances, especially by the fact that numerous American vessels and their cargoes had been destroyed by the German submarine warfare, and by the further fact that the German vessels, if released, could not have returned to their home ports and might possibly have been sunk in the channels of the port, is a question of public morality, not of positive law. The same is true of the justice or injustice of the provision of the Treaty of Versailles by which Germany consented to the cession to the Allied and Associated governments of all the German merchant ships of sixteen hundred tons gross and upward.[3] The benefit of these provisions was assumed to the United States by its separate treaty of peace with Germany in 1920.[4]

f. Commercial intercourse between enemy citizens

Since the outbreak of war between two states automatically dissolves or suspends all legal relations between them, it remains for each belligerent to decide how far it will recognize as valid commercial relations between its individual citizens and persons who are citizens of or resident in the enemy country. The question is primarily one of domestic municipal law, since there is no custom or convention imposing an obligation upon states to follow a particular rule in the matter. Nevertheless, it has been common for courts and publicists to discuss the subject in terms

[1] Compare Art. XXIII of the treaty of 1785 which expired in 1796.

[2] Arguments pro and con on the question of the right of confiscation are given by Garner, *op. cit.*, I, § 116. Hyde believes that the action of the United States did not violate "any legal duty imposed by the law of nations." *International Law*, II, 523.

[3] Part VIII, Annex III, 1.

[4] On the general subject, see A. P. Higgins, "Enemy Ships in Port at the Outbreak of War," *British Year Book*, 1922-23, 55-78.

of international law, due partly to the failure to draw a clear distinction between international law and the municipal law common to several states,[1] and partly to the analogy between the contract rights of alien enemies and their general property rights which have obtained an inchoate recognition at international law. The practice of states down to 1914 showed on the one hand an attitude, as exemplified in the decisions of the British and American courts, which regarded all commercial intercourse between enemy subjects as illegal by the very fact of war between their respective states. In the case of the *Hoop*[2] the British court condemned a cargo which a neutral vessel had shipped at Rotterdam for the account of certain British merchants, announcing that there was "a general rule of maritime jurisprudence of this country, by which all trading with the public enemy, unless with the permission of the sovereign, is interdicted." In the case of the *Rapid*[3] the United States Supreme Court condemned a cargo which an American citizen had purchased before the outbreak of war and had deposited upon an island near the boundary line of the United States, and which he attempted to bring home after the outbreak of war. On the other hand the states of continental Europe had generally followed the practice of not regarding trading with the enemy as illegal by the mere fact of war, but only in consequence of an express prohibition of the government.

Test of enemy character

The difference between the attitude of the British and American courts and that of continental courts in respect to trade with the enemy appears further in the test by which enemy character was determined. The rule of English and American law was that the legal status of a particular trader was determined by his residence or domicile, not by his nationality. Consequently trade was forbidden with neutral citizens and even with persons owing political allegiance to a state if they were resident within enemy territory; and at the same time trade was permitted with persons of enemy nationality resident within neutral territory.[4] On the other hand continental governments adopted the test of nationality as determining enemy character, so that trade was prohibited with persons owing allegiance to the enemy even when resident in neutral countries. Both Anglo-American and continental practice

[1] As Oppenheim points out, *International Law*, II, § 101.
[2] 1 C. Rob., 196 (1799). Scott, *Cases*, 622; Evans, 459.
[3] 8 Cranch, 155 (1814). Scott, *Cases*, 631.
[4] For the numerous cases that have arisen in connection with domicile as a test of enemy character, see Scott, *Cases*, 659-693.

has excepted from the term "enemy" persons of enemy nationality residing within the territory of the respective belligerent states.[1]

Contracts between enemy citizens

Numerous difficult questions have arisen in connection with the application of the principle of non-intercourse to the various relations of commercial life. What contracts between enemy citizens must be held to be "trading with the enemy"? In general, contracts entered into during the war have been declared by British and American courts to be *ipso facto* void, unless entered into under a special license,[2] or those belonging to the class known as *commercia belli*, such as the ransom bills of earlier centuries and bills of exchange drawn by prisoners. Contracts entered into before the war are either dissolved, when they are executory and time is material and of the essence of the contract, or else merely suspended in their operation until the close of the war. In the case of Griswold *v.* Waddington [3] it was held by the court of New York that a business partnership between an American and a British citizen was forthwith dissolved by war between the two countries, since a partnership necessarily involved commercial intercourse. Again in the case of New York Life Insurance Co. *v.* Statham [4] the Supreme Court of the United States held that a life insurance policy was annulled by reason of the non-payment of premiums caused by the existence of a state of war. On the other hand in the case of Kershaw *v.* Kelsey [5] it was held by the Supreme Court of Massachusetts that a contract between a citizen of that state and a citizen of Mississippi for a lease of land continued in force, and that unpaid rent might be collected at the end of the war. Further, it was held in Hanger *v.* Abbott [6] that, since war only suspended debts due to an enemy, the statute of limitations of Arkansas could not be pleaded against a citizen of New Hampshire, who had been unable owing to war to bring action within the prescribed period. British decisions are to the same effect as those of the United States courts.[7]

Practice during the World War

At the outbreak of the World War Great Britain promptly issued a proclamation (August 5) forbidding trade "with any per-

[1] See above, pp. 447-448.

[2] For the conditions under which such a license might be granted, see, for example, the United States Trading with the Enemy Act, October 6, 1917, §§ 4-5.

[3] 16 Johnson's Rep. 438 (1819). Scott, *Cases*, 604; Evans, 477.

[4] 93 U. S., 24 (1876). Scott, *Cases*, 617.

[5] 100 Mass., 561 (1868). Scott, *Cases*, 654; Evans, 463.

[6] 6 Wallace, 532 (1867). Scott, *Cases*, 613; Evans, 497.

[7] For cases, see Cobbett, *Cases*, II, 62-91. Scott, *Cases*, 585-621.

CHAP. XXVII

son resident, carrying on business, or being in the German Empire" without permission of the Government. This was followed by the Trading with the Enemy Act of September 18, 1914, which followed in its terms the traditional policy of the country.[1] On December 23, 1915, however, the British Government adopted the policy followed by France of proscribing trade with persons or corporations of enemy nationality doing business in neutral states. A black-list was drawn up enumerating the firms with which trade relations might not be maintained. This action led to a protest from the United States, under date of July 26, 1916,[2] claiming that the measure was "inevitably and essentially inconsistent with the rights of the citizens of all the nations not involved in the war."[3] However, when the United States itself became a belligerent the same policy toward enemy traders in neutral countries was adopted in the Trading with the Enemy Act of October 6, 1917, the President being empowered to extend the term "enemy" to include such persons should he deem it expedient to do so. On the part of Germany an ordinance of September 30, 1914, prohibited the making of payments in any form, by cash, bills of exchange, or the transfer of securities, to persons domiciled or resident in the British Empire.[4] Beyond this measure of retaliation the German Government, as a matter of domestic policy, did not find it expedient to go.

g. Obligation to give warning before commencing hostilities

It is an old and well established principle of international law that a state must not resort to forcible procedure against its opponent without giving due warning that hostilities are about to commence. A sudden attack by one state upon another, before negotiations looking to a settlement of the controversy have been undertaken and have reached the point where the redress demanded was apparently not to be granted, has been regarded from the earliest times as an act of international brigandage. Among the ancient Greeks and Romans, as apparently among other ancient peoples, the practice prevailed of announcing the commencement of hostilities by a formal declaration of war.[5] The Romans in particular laid stress upon the necessity of a prior demand for repara-

[1] For the text see Baty and Morgan, *War: Its Conduct and Legal Results*, 492-498.

[2] *Am. White Book*, IV, 85.

[3] The merits of the American contention are discussed by Garner, *op. cit.*, I, § 160.

[4] See Garner, *op. cit.*, I, §§ 164-167, where references are given to German judicial decisions.

[5] Phillipson, *International Law of Ancient Greece and Rome*, II, 197 ff.

tion (*rerum repetitio*), following which, if redress was not granted, war was formally declared by members of the college of fetials to whom that duty was intrusted.[1] During the Middle Ages the practice of despatching heralds to announce war with due ceremony was revived, doubtless under the influence of the traditions of the Roman law. In later centuries formal diplomatic announcements were made; but by the eighteenth century, notwithstanding the assertions of publicists that a declaration of war was necessary,[2] the practice of giving formal notice had fallen into disuse. War was frequently begun without notice of any kind, though in most cases under circumstances which of themselves constituted a sufficient warning. On occasion, as between Great Britain and France in 1756, formal declarations were issued some time after actual hostilities had begun. In the absence of a declaration, the date of the commencement of war, necessary to the determination of prize cases, was marked by the first hostile act.

Modern declarations of war

During the second half of the nineteenth century the practice of issuing declarations of war was revived, and in 1870, on the side of France, and again in 1877 on the side of Russia, formal notice of the commencement of hostilities was given. In 1898 the United States regarded the terms in which Spain received the ultimatum contained in the joint resolution of Congress on April 21 as equivalent to a declaration of war, and thereupon commenced hostilities without delay.[3] The formal declaration of war, issued on April 25, dated the existence of hostilities back to April 21. A serious, if unfounded [4] charge brought against Japan by Russia in 1904 of treachery in the attack upon the Russian fleet at Port Arthur two days before the declaration of war showed the necessity for a general international agreement upon the subject.

The Hague Convention of 1907

At its meeting at Ghent in 1906, the Institute of International Law adopted resolutions urging not only due warning but also a

[1] That the formalities attending the commencement of war did not preclude arbitrary conduct on the part of Rome in respect to the judgment passed upon the grounds of war is obvious. All that can be claimed for the procedure is that it precluded a sudden and treacherous attack without prior opportunity on the part of the other state to submit to the terms presented.

[2] Grotius held that a war to be just must be "publicly decreed." *De Jure Belli et Pacis* (Eng. trans.), Bk. III, Chap. III, § V. Vattel looked upon a declaration of war as "necessary as a last effort to end the dispute without shedding of blood, by making use of fear to bring the enemy to a sense of justice." *Droit des Gens* (Eng. trans.), Bk. III, § 51.

[3] Moore, *Digest*, VII, 170.

[4] For the merits of the controversy, see Hershey, *International Law and Diplomacy of the Russo-Japanese War*, Chap. I; Takahashi, *International Law Applied to the Russo-Japanese War*, Chap. I.

sufficient delay between the declaration and the commencement of hostilities to prevent an evasion of the rule of previous notice.[1] A year later the subject was brought before the Second Hague Conference, and a rule of statutory law was adopted in the form of a Convention (III) relative to the Opening of Hostilities. This convention provides that hostilities between the contracting powers "must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war."[2] Moreover, the existence of a state of war must be notified to neutral powers without delay, and shall not take effect in regard to them until so notified, unless it be clearly shown that they were in fact aware of the existence of war.[3]

The effect of the provision of the Hague convention is, for the powers that have ratified it, to fix an unequivocal date for the commencement of the war instead of the less certain date of the first act of hostilities. Moreover, it assures a definite statement of the grounds upon which the war is undertaken. It does not, however, preclude the possibility of a surprise attack in case the declaration is immediately followed by hostilities. Nor does the sending of an ultimatum with a conditional declaration of war guard against a surprise attack when, as in the case of the Austro-Hungarian forty-eight-hour ultimatum to Serbia in 1914, negotiations have not been in progress and the state against which the ultimatum is directed is not aware that a crisis is at hand. It would seem, therefore, that the Hague convention accomplished little in respect to the fundamental problem with which the nations were confronted, and that such legal protection as exists against surprise and treachery is to be found in the old customary rule.[4]

In the case of civil war no declaration is needed on the part of the *de jure* government against the *de facto* rebel or insurgent government, the latter having no rights at international law against the former. If, however, the *de jure* government undertakes to restrict the commerce of neutral states with the rebels, it thereupon marks the commencement of legal war in so far as neutral states are concerned, and cannot subsequently complain if neutral states regard the rebels or insurgents as *de facto* belligerents. Thus

[1] *Resolutions*, 163-164.

[2] Art. 1. [3] Art. 2.

[4] For the practice of states at the beginning of the World War, see Phillipson, *International Law and the Great War*, Chap. III.

the proclamation of blockade, on April 19, 1861, marked the commencement of the American Civil War in respect to third powers and justified the recognition by Great Britain of the Confederate States as belligerents.[1]

[1] See above, p. 109.

CHAPTER XXVIII

THE LAWS OF LAND WARFARE

a. Lawful combatants

As late as the seventeenth century no clear distinction was recognized in international law between armed combatants and unarmed inhabitants, whether in respect to the rights of the latter to participate in the defense of their country or in respect to their immunity from personal attack. Grotius repeated the doctrine of earlier writers that innocent non-combatants were to be spared,[1] but his stand upon the natural law was not supported by the practice of the day.[2] By the close of the century however, it came to be recognized that unarmed citizens should not be attacked, on condition that they themselves should take no part in hostilities. The implications of this latter condition, however, presented serious difficulties. What was the status of bodies of troops operating independently of the main army, and that of groups of citizens who rose *en masse* to resist an invading enemy? The practice of the states varied widely. The Instructions for the Government of Armies of the United States in the Field,[3] issued during the American Civil War, made a distinction between "partisans," who were soldiers belonging to a corps detached from the main army and acting under the authority of the commander-in-chief, and who were held entitled to be treated as prisoners of war, and on the other hand bodies of men who committed hostilities "without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war," and who were to be treated "summarily as highway robbers or pirates."[4] The latter have sometimes been called "guerrillas,"[5] but this term

[1] *De Jure Belli et Pacis* (Eng. trans.), Bk. III, Chap. XI, §§ VIII-XII.

[2] See Walker, *History*, 194.

[3] General Orders, 100, issued April 24, 1863. The Instructions were prepared by Francis Lieber at the request of President Lincoln. They are frequently referred to as Lieber's Code. For the text, see Wilson and Tucker, *International Law*, 8th ed., Appendix I.

[4] No. 82. For the status of the Confederate Partisan Rangers, see Bordwell, *The Law of War between Belligerents*, 79.

[5] As by General George B. Davis, *Elements of International Law*, 292.

is more properly used as synonymous with partisans.[1] The Instructions further recognized[2] the right of the population of an invaded territory to rise *en masse* to resist the invader. By contrast, the rules enforced by the German army upon its invasion of France in 1870 were most severe, requiring practically impossible conditions of volunteer corps and local militia (*francs-tireurs*) and punishing with great severity resistance by unorganized populations.[3]

Provisions of the Hague conventions

In 1874 an effort was made at Brussels to formulate a rule of law upon the subject, but the conference could not reach a decision at once satisfactory to the several states possessing large and small standing armies. Finally in 1899 the Convention respecting the Laws and Customs of War on Land[4] was adopted at the Hague, embodying in an annex a series of provisions "intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants." Article 1 of these Regulations lays down four conditions under which "the laws, rights, and duties of war" may apply to militia and volunteer corps as well as to the "army" proper: (1) that they be commanded by a person responsible for his subordinates; (2) that they have a fixed distinctive emblem recognizable at a distance; (3) that they carry arms openly; (4) that they conduct their operations in accordance with the laws and customs of war.

Use of "savages"

No mention is made in the Regulations of the use of "savage" or "semibarbarous" troops; and, following the rule of the convention that such cases not provided for in the Regulations must be governed by the provisions of the customary law, it would seem that the test of their use, whether Turcos from North Africa or Zulus from South Africa, would be the possibility of their conforming to the condition of conducting operations in accordance with the laws of war.[5] Further, the Regulations provide that the inhabitants of a territory which has not been occupied may upon the approach of the enemy spontaneously take up arms to resist the invading troops and must be regarded as belligerents in spite of not conforming to the conditions in respect to organization laid

[1] See Spaight, *Laws of War on Land*, 61 ff.
[2] Nos. 51, 52.
[3] For details, see Spaight, *op. cit.*, 41 ff.
[4] For the text of the convention, see Malloy, *Treaties*, II, 2269; *Hague Conventions*, 100.
[5] For the controversy over the use of such troops, see Spaight, *op. cit.*, 65-72.

CHAP. XXVIII

down for volunteer corps, provided that they conform to the conditions of carrying arms openly and respecting the laws and customs of war.[1]

Status of war rebels

The Regulations are silent with respect to the status of levies *en masse* in territory already occupied by the invader. Such persons, known as "war rebels," were, under the United States Instructions of 1863, subject to the penalty of death irrespective of their numbers or of their authorization by their own expelled government.[2] It was contended at the Hague by the smaller states that such uprisings should be treated as similar uprisings upon the approach of the enemy. But certain of the larger states with powerful standing armies were unwilling to agree, and the question was left as it stood under the customary law.[3] On the whole, the provisions of the Hague Regulations left the law in an obscure condition, since the concession to levies *en masse* in Article 2 conflicts with the conditions laid down for volunteer corps in Article 1, unless a very narrow interpretation is to be given to the phrase, "approach of the enemy."[4]

German practice in 1914

The provisions of Article 2 of the Hague Regulations were put to a severe test in the German invasion of Belgium in August, 1914. Once the decision was taken to violate the neutrality of Belgium, military necessity made it imperative for the German army to overcome the resistance of the inhabitants both to the passage of troops and to the permanent occupation of the territory. Since Article 2 of the Hague Regulations was not technically binding upon Germany, the German interpretation of the usage with respect to levies *en masse* was applied,[5] and unauthorized acts of hostility committed upon the approach of the enemy by the inhabitants of towns and villages were punished with great severity. Sniping, whether on the part of individuals or of groups, was repressed, not only by the execution of the offenders, but by the burning of houses and the execution of hostages taken as a rule from among the older and more important personages of the district.[6] On occasion hostages were used as a screen to protect the

[1] Art 2. Compare *Instructions*, No. 51.

[2] No. 85.

[3] For details of the several points of view, see Spaight, *op. cit.*, 53-54.

[4] The unsatisfactory nature of the compromise is discussed by Spaight, *op. cit.*, 54 ff.

[5] See *German War Book*, Morgan's trans., Chap. I. The German requirements were that levies *en masse* should be organized in the same manner as volunteer corps and wear a distinctive mark visible at a distance.

[6] For details and references, see Garner, *International Law and the World War*, I, Chap. XII.

column of the enemy as it entered a new village. It would appear that, in consequence of a circular issued by the Belgian minister of the interior on August 4, calling upon the local authorities to warn the inhabitants against committing acts of hostility, such sniping as was done and such resistance as was offered were the result rather of irresponsible individual than of concerted group action. The attempt to hold the community responsible for the isolated acts of individuals was in violation of the rule laid down in the Hague Regulations, to the effect that "no general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they can not be regarded as jointly and severally responsible."[1] Whether, however, this principle expressed a rule of customary law is open to question.

b. Instruments of warfare

With a few exceptions, the question of restrictions upon the use of particular instruments of warfare is a modern one. The prohibition of the use of poisoned weapons is as old as the Code of Manu, and was approved by the ancient Greeks and Romans as well as by medieval writers, although practice often failed to conform to principle.[2] The Second Lateran Council, meeting in 1139, issued a prohibition of the use of the crossbow and the arbalist, though the injunction proved ineffective. Again, the harquebus was condemned, but without effect upon international practice. The attempt of chivalry to bar the newer inventions of science, as unworthy of brave men, failed, apparently on grounds similar to those advanced in more modern times.[3] The Instructions of 1863 forbade the use of poison in any manner, "be it to poison wells or food or arms."[4] It remains, however, an open question whether the pollution of drinking-waters by methods which involve no deception, such as the contamination of a well or stream by dead cattle, is in violation of customary law.[5]

Prohibition of explosive and dum-dum bullets

In 1868 a conference of European military delegates met at St. Petersburg to take action with regard to the new explosive bullets, and a declaration was adopted containing both a statement of general principles and a specific agreement forbidding the use of "any projectile of a weight below 400 grammes (about fourteen

[1] Art. 50.

[2] See Walker, *History of the Law of Nations*, I, 42, 56, 72.

[3] The student may be reminded of the classic words of the Chevalier Bayard who, when dying in 1524 of a wound inflicted by a harquebus, thanked God he had never shown mercy to a musketeer.

[4] Art. 70.

[5] For a discussion of instances occurring during the American Civil War and the Boer War of 1899-1902, see Spaight, *Laws of War on Land*, 84.

CHAP. XXVIII

ounces avoirdupois) which is either explosive or charged with fulminating or inflammable substances."[1] The principles upon which the declaration proceeded were: (1) that the progress of civilization should have the effect of alleviating as much as possible the calamities of war; (2) that the only legitimate object which states should endeavor to accomplish during war was to weaken the military forces of the enemy; (3) that for that purpose it was sufficient to disable the greatest possible number of men; and (4) that this object would be exceeded by the employment of arms which needlessly aggravated the suffering of disabled men or rendered their death inevitable.[2]

Prohibitions adopted at the Hague conferences

Further restrictions upon the instruments of warfare were laid down by the First and Second Hague Conferences. Article 23a of the Regulations attached to the Convention respecting the Laws and Customs of War on Land forbids the employment of poison or poisoned arms.[3] Article 23e forbids the employment of "arms, projectiles or material of a nature to cause superfluous injury." In addition, three declarations were drawn up, although not signed by a sufficient number of states to give them general validity.[4] The first of these, as renewed in 1907, prohibited for a period extending to the close of the Third Peace Conference "the discharge of projectiles and explosives from balloons and by other new methods of a similar nature." France, Germany, Italy, Russia, and Japan refused their signatures when the declaration was renewed in 1907.[5] The second declaration embodied an agreement, without time-limit, "to abstain from the use of projectiles the sole

[1] For the text of the declaration, see Higgins, *Hague Peace Conference*, 5; Hershey, *Essentials of International Law*, 389.

[2] The principles of the Declaration of St. Petersburg were the subject of considerable controversy from the time of their adoption. They must obviously be interpreted liberally, as an effort to prohibit certain excesses of cruelty, leaving other measures, such as starvation by blockade and the use of projectiles over the prescribed size, unaffected by the prohibition.

[3] For the text of the convention see Malloy, *Treaties*, II, 2269; *Hague Conventions*, 100.

[4] For the texts of the declarations, see Higgins, *Hague Peace Conferences*, 484 ff.; *Hague Conventions*, 220 ff.

[5] The United States and Great Britain had refused ratification of the declaration of 1899, but ratified the declaration of 1907. In explanation of the refusal of his signature in 1907 the French delegate stated that the problem of aërial navigation was progressing so rapidly that it was unwise to "forbid in advance the right to profit by new discoveries" which might be more effective with respect to the legitimate objects of attack without being less humane. *Proceedings*, III, 147. In view of the refusal of so many of the leading powers to ratify the declaration it can scarcely be regarded as binding even between those that ratified, general ratification being doubtless an implied condition.

object of which is the diffusion of asphyxiating and deleterious gases." The United States delegation refused its signature, Captain Mahan pointing out that the prohibition was being adopted in ignorance of the practical effects of such shells and that the restriction was inconsistent with other instruments and methods of warfare.[1] A third declaration, also without time-limit, contained an agreement "to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions." These bullets, known as "dum dum" bullets, after the arsenal near Calcutta where they were first made, were introduced by the British as a means of putting out of action Indians who could not be stopped by the use of ordinary bullets. The declaration was not signed in 1899 by the United States or Great Britain, owing to their preference for a prohibition framed in more general terms;[2] and the United States continued its opposition even after Great Britain had acceded to the declaration in 1907.

Practice during the World War

During the World War the only restrictions which obtained legal recognition were those relating to the traditional forms of the use of poison and to dum dum bullets. Accusations were made on both sides of violations of the prohibition against the poisoning of wells and the use of dum dum bullets, but it would appear that they were justified only in exceptional instances.[3] Germany protested against the use of shot-guns by the American Army, but the United States refused to admit the obligation to abandon them. In the spring of 1915 the German army began using asphyxiating and poisonous gases, and the British and French armies promptly retaliated. With the invention of adequate masks the earlier denunciation of "gas attacks" as illegal[4] was succeeded by compe-

[1] Higgins, *op. cit.*, 493, gives the argument at length. See also *Proceedings of the Hague Peace Conferences,* Conf. of 1899, pp. 283, 366.

[2] For the argument of Captain Crozier in favor of permitting modified dum-dum bullets and prohibiting explosive bullets, see *Proceedings of the Hague Peace Conferences,* Conf. of 1899, pp. 79 ff. More recently, Hyde justifies the explosive bullet, "by reason of its potentiality in destroying human life," and condemns expansive bullets as offering "no military advantage commensurate with the harm inflicted." He takes the position that "it is not the extent of injury or destruction capable of being wrought by a projectile so much as the nature of the harm which it produces which should be applied as the test of lawful conduct." *International Law,* II, § 661.

[3] For a review of the controversy, see Garner, *International Law and the World War,* I, Chap. X.

[4] The question as to whether the use of gas, by the methods employed, came within the prohibitions of the Hague convention, Article 23 (see above, p. 464), is reviewed by Garner, *op. cit.,* I, Chap. X. It should be observed that the Hague declaration relating to asphyxiating and deleterious gases merely

tition in the discovery of more deadly gases, and by the close of the war such means of warfare were accepted without further question.

The Washington treaty of 1922

Upon the return of peace the question of the use of poisonous gases was reconsidered upon its merits, and at the Washington Conference of 1921-22 a treaty was signed by the powers represented at the conference which declares that "the use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties," the signatory powers assent to the prohibition and invite other nations to adhere to the agreement in order that the prohibition may be "universally accepted as a part of international law."[1] General ratification of or adhesion to, the Washington treaty, however, would doubtless not convict the signatory powers of bad faith if they were to continue research work with a view to the manufacture of more deadly gases to be used, according to the law of reprisals, in case the other party failed to live up to the proposed agreement.[2]

c. Methods of warfare: obligation to give quarter

In respect to methods of warfare, as in respect to instruments, the same difficulty has arisen of determining what conduct is admissible, or legal, under the circumstances of the particular case in hand. Certain general principles are accepted, but their application to concrete situations presents numerous points of dispute. Beginning with those methods of warfare which affect the combatant armies only, custom as well as convention declares it unlawful "to kill or wound an enemy who, having laid down his arms, no longer having means of defence, has surrendered at discretion."[3] It is likewise forbidden to announce in advance that no quarter will be given.[4] The latter rule presents no difficulties in practice, and negatives the earlier custom of attempting to intimidate the enemy to surrender in cases where a small number held a strategic

proscribed their use in connection with projectiles, not their use when emitted from cylinders and blown towards the enemy by the wind.

[1] Art. V. For the text of the treaty, see *Am. Journal*, XVI (1922), Supp., 57.

[2] The vicious circle is obvious, being the result of the necessity of individual self-protection in the absence of an international organization capable of assuring the general peace by the collective action of the community. It appears to be believed that poisonous gases are too effective a weapon to permit a nation to forego preparations for their use in reliance upon the good faith of a possible opponent.

[3] Hague Regulations, Art. 23c. [4] Art. 23d.

position from which it would be costly for the larger force to dislodge them.[1]

The rule forbidding the killing of those who have surrendered has been more difficult of application. The practical conditions of a frontal attack have frequently made it impossible for the attacking troops to "take prisoners." The necessity of pushing deeper into the enemy's lines, the difficulty of disposing of those who have surrendered without endangering the rear of the attacking troops, and the practical impossibility for officers to restrain themselves or their men when in the heat of action, have led to numerous exceptions to the general principle. The American Instructions of 1863 recognized the right of a commander to refuse quarter in cases of imperative necessity, when the presence of prisoners would endanger the safety of the army;[2] and the exception is doubtless consistent with international practice. On the other hand, the contrast between the average practice of modern times and the indiscriminate slaughter of the wars of the seventeenth century shows that, admitting the exceptions, the general principle has had an appreciable effect in restraining the conduct of disciplined armies.[3]

The use of deceit

Ruses of war or stratagems are recognized by international law as legitimate means of deceiving the enemy, and their customary use is confirmed by the Hague Regulations.[4] Their use, however, is restricted by the condition that they must not involve a violation of good faith. Hence they may not be resorted to in cases where the enemy has been taken off his guard by any of the recognized signs, such as flags of truce or the Red Cross emblem, of a desire to establish communication or to enjoy immunity from attack. Nor may the agents appointed to enter into a parley with the enemy perform any hostile act under cover of their pacific character. A debatable issue is presented by the use of the uniform of the enemy or of his national flag. The Regulations forbid the "improper" use of these emblems,[5] but the vagueness of the pro-

[1] For a discussion of the former attitude of commanding officers toward besieged towns which presumptuously dared to hold out against superior forces when the capture of the fortress was regarded as certain, see Vattel, *Droit des Gens* (Eng. trans.), Bk. III, § 143; Hall, *International Law*, § 129, n. For a modern instance see Spaight, *War Rights on Land*, 99.

[2] *Instructions*, No. 60. See, however, *Rules of Land Warfare*, No. 183.

[3] For instances in illustration of the practical problems presented to attacking forces, see Spaight, *op. cit.*, 91 ff.

[4] Art. 24. "Ruses of war and the employment of methods necessary for obtaining information about the enemy and the country are considered lawful."

[5] Art. 23f. It is forbidden "to make improper use of a flag of truce, of the national flag, or of military insignia and uniform of the enemy, as also the distinctive signs of the Geneva Convention."

hibition would seem to leave the question to be settled by the customary law. Practice has sanctioned the use of the enemy's uniform, taken from the dead or from prisoners, where necessary to relieve a shortage of clothing; but in such cases a distinctive emblem must be used, or alterations made so as to prevent deception.[1] Earlier practice also sanctioned the use of the enemy flag or uniform as a means of drawing him into action and its use as a means of escaping from him. While the latter use would not appear inconsistent with the Regulations, the former is regarded by many writers as being so. The customary rule merely prescribes that in such cases the disguise must be dropped before action commences; but it is pointed out that there is no logic in a rule which permits a belligerent to lure the enemy to a position by a form of deceit which becomes unlawful only when it is too late for the enemy to benefit by the removal of the disguise.[2] By an old customary law, confirmed by the Hague Regulations, it is forbidden "to kill or wound treacherously individuals belonging to the hostile nation or army."[3] Apart from the above cases involving bad faith, deceit is widely used in warfare, and under the name of "strategy" has been the deciding factor of many battles. It may be added that while it was formerly thought by certain writers unlawful to incite the enemy's troops to treason or desertion,[4] practice during the World War discarded any such usage and engaged freely in the attempt to break down the morale of the enemy's troops by propaganda taking various forms.

Spying

The use of spies in time of war is a measure of recognized legality, notwithstanding the severe penalty inflicted upon the spy if caught by the enemy. Difficulties in international practice have, however, arisen from lack of a sharp distinction between spies, scouts, despatch-bearers, and war traitors. The Hague Regulations follow the customary law in making the essence of spying consist in acting "clandestinely or on false pretenses" with the object of obtaining information in the zone of operations of a belligerent and of communicating it to the enemy.[5] It is further provided that soldiers not in disguise, properly known as "scouts," may

[1] For examples in recent wars, see Spaight, *op. cit.*, 106-110.

[2] See Hall, *International Law*, § 187; Hyde, *International Law*, II, § 659. For the use of the enemy's flag at sea, see below, 501.

[3] Art. 23b. Vattel quotes the classic instance of the rejection by the Roman consuls of the proposal of the physician of Pyrrhus that he should poison his master. Bk. III, § 155.

[4] See Westlake, *International Law*, 2nd ed., II, 83.

[5] Art. 29.

penetrate the enemy's lines to obtain information without being considered spies. So also despatch-bearers, whether soldiers or civilians, are not considered spies if they carry out their mission openly. Persons sent in balloons to deliver despatches or maintain communication between different parts of the army or territory come within the same class.[1] It would appear that soldiers or civilians using air-ships for scouting or similar purposes share the exemption accorded by the Hague Regulations to persons in balloons. Upon the outbreak of the Russo-Japanese War, Russia announced the intention of treating as spies war correspondents who should communicate news to the enemy by wireless telegraphy, but the threat was not carried into effect.[2] The Regulations provide for a trial of spies before punishment, and emphasize the legality of the use of spies by providing that a spy who has escaped and is afterward captured is to be treated as a prisoner of war.[3] The American Rules of Land Warfare emphasize the customary rule that no distinction of sex is made in respect to the penalty inflicted upon spies.[4]

War treason

Distinct from the act of spying, which involves acts done by persons in the service of the enemy, is the act of individuals who upon their own initiative secretly communicate with the enemy or otherwise give him aid and comfort. The offense may be committed by either a citizen or a resident alien against the *de jure* government of the country, or by the inhabitant of an occupied territory against the military occupant. It is a question of municipal law what punishment a state may inflict upon its own citizens who hold communication with, or otherwise give aid and comfort to, the enemy; and international law sanctions the same penalties with respect to alien residents of whatever nationality who are guilty of the same acts. The term "war traitor" is applied to the citizens or subjects of an invaded or occupied country who give information to their own expelled government or to the army of their country, or who serve as guides to their own army.[5] Custom sanctions the imposition of severe penalties upon war traitors, the death penalty being imposed in cases where the information or aid given to the enemy is of an important character.

[1] Art. 29.
[2] See Hershey, *International Law and Diplomacy of the Russo-Japanese War*, 115 ff.
[3] Art. 30, 31.
[4] No. 201. For the case of Edith Cavell, see below, p. 470.
[5] See *U. S. Rules of Land Warfare*, Nos. 203-207.

CHAP. XXVIII

Case of Edith Cavell

It would appear that the offense committed by the British nurse, Edith Cavell, at Brussels in 1915 was that of war treason, aggravated by the fact that her position as a Red Cross nurse was one of special trust. On the other hand, the aid alleged to have been rendered by her to the enemy appears to have been insignificant in itself, and it bore no relation to the safety of the army of occupation.[1] The penalty of death imposed upon her was, therefore, more severe than usage warranted.[2]

d. Treatment of prisoners of war

The modern rules of international law with the respect to the treatment to be accorded to prisoners of war stand in marked contrast with the prevailing practice of earlier times. As Grotius found it, the law of nations authorized the enslavement of prisoners, but the influence of Christianity had moderated the rigor of the law in favor of the alternative practice of holding prisoners for ransom.[3] This latter practice was encouraged by the rule now discarded, that prisoners belonged to the individual or to the army corps which captured them, so that the ransom money went directly to the captors.[4] At times the prisoner was allowed to ransom himself by means of a ransom contract, which, as has been said, formed an exception to the rule with respect to the validity of contracts between enemies.[5] The growing tendency during the second half of the nineteenth century toward the "humanizing" of war led to the formulation, at the Brussels Conference in 1874, of elaborate provisions for the improvement of the condition of prisoners.[6] Finally, the First and Second Hague Conferences incorporated these and other proposals into the Regulations annexed to the Convention respecting the Laws and Customs of War on Land.

Provisions of the Hague Regulations

The Regulations laid down the two general principles that prisoners of war are "in the power of the hostile government" as distinct from that of the individuals or corps which captured them, and that they must be "humanely treated."[7] Further provisions of a most specific character deal with various aspects of the treatment to be accorded them. The captor government obligates itself to maintain them, and accepts as a normal standard of

[1] For details, see Garner, *op. cit.*, II, §§ 382-386.

[2] Doubtless the secrecy attending the trial of Miss Cavell and the general policy of intimidation pursued by the German army of occupation in Belgium served to accentuate the severity of the death penalty.

[3] *De Jure Belli et Pacis*, Bk. III, Chap. VII.

[4] See Walker, *History of the Law of Nations*, 189 ff.

[5] See above, p. 455.

[6] For the text of the Brussels Declaration, see Higgins, *The Hague Peace Conferences*, 273 ff.

[7] Art. 4.

maintenance the food, quarters, and clothing assigned to its own troops.[1] Prisoners are to retain possession of their property, with the exception of arms, horses, and military papers.[2] They may be interned in towns or fortresses, and may be kept in confinement only when the circumstances urgently demand it.[3] They may, with the exception of officers, be put to labor at tasks not connected with the operations of war, and must be paid for their services.[4] Prisoners are liable to disciplinary punishment in case they show insubordination or attempt to escape.[5] They may be set at liberty on parole provided the laws of their country permit it, in which case their own government assumes an obligation not to require or accept service from them incompatible with the parole given.[6] Provision is made for the establishment by the belligerents of bureaus of information relative to prisoners,[7] and for the acceptance of the charitable services of relief societies organized in the country to which the prisoner belongs,[8] both of which agencies are granted special privileges for the performance of their duties. These leading rules are accompanied by further detailed provisions for their administration or enforcement. After the conclusion of peace the repatriation of prisoners is to take place with the least possible delay.[9] This subject, however, has been generally provided for in the treaty of peace itself.[10]

Practice during the World War

The experience of the World War showed the difficulty of reconciling the improved conditions provided for prisoners by the Hague Regulations with the exigencies of a state at war.[11] The principle calling for humane treatment appears to have broken down in many cases before the instincts of cruelty aroused by intense national hatreds. The rule imposing upon the belligerent government the obligation of the maintenance of prisoners has been shown to have led to the utilization of their labor beyond the intention of the Hague Regulations. The right to impose disciplinary punishment for insubordination led in certain instances to measures of barbarous severity. Above all, the standard of maintenance in respect to food, clothing, and shelter observed

[1] Art. 7. [2] Art. 4. [3] Art. 5.
[4] Art. 6. [5] Art. 8. [6] Art. 10.
[7] Art. 14. [8] Art. 15. [9] Art. 20.

[10] See, for example, Treaty of Paris between the United States and Spain, 1898, Art. VI. Malloy, *Treaties*, II, 1692. See also, Treaty of Versailles, 1919, Art. 214-224.

[11] Account must be taken of the fact that the Regulations as such were not binding upon the belligerents, but that they represented on the whole the modern usage of states.

CHAP. XXVIII

by the Central Powers was far below that contemplated by the Hague Regulations.[1]

The question as to how far this situation was justified by military necessity goes to the root of the effectiveness of any specific agreement of the kind. The German Government, while admitting the general principle of its obligation of adequate maintenance, alleged its inability to make such adequate provision in consequence of the blockade to which the entire country was subjected. With the adoption of a nation-wide system of reduced rations, the standard fixed by the Hague Regulations would have been one of preferential treatment of prisoners as against the general civilian population. In some instances almost the entire burden of feeding and clothing prisoners was cast upon the relief societies organized in their home countries. At the same time, the reports of investigations conducted by neutral agencies showed numerous instances of neglect and even deliberate cruelty, for which responsibility must be set down to the stress of national feeling accompanying the highly organized methods of modern warfare, and to mere uncontrolled human instincts.[2]

The sick and the wounded

The adoption of definite international obligations with respect to the care by belligerents of the sick and wounded of the enemy dates from the Geneva Conference of 1864. Prior to that time the practice of states varied widely, being dictated apparently more by the humane instincts of the particular belligerent than by accepted customary rules. The Geneva Convention[3] laid down the broad principle that sick and wounded soldiers should be cared for by the belligerent in whose power they were, without distinction of nationality. In addition to elaborate provisions with repect to ambulances and military hospitals and their personnel and material, it was agreed to adopt the emblem of the Red Cross as the distinctive sign of the sanitary service. A second conference met in 1906 and drew up a revised convention bringing the earlier provisions more into accord with modern science and modern

[1] For details, see Garner, *op. cit.*, II, Chap. XXI, XXII.

[2] During the course of the war the United States endeavored to obtain more satisfactory provisions for the treatment of prisoners by the negotiation with Germany of the Berne Agreement of November 11, 1918, the ratification of which by the United States was neglected in consequence of the close of the war. For the terms of the agreement see *Am. Journal*, XIII (1919), Supp., 1. For a commentary see Stone, "The American-German Conference on Prisoners of War," in *Am. Journal*, XII (1919), 406. For a general study of the treatment of prisoners of war during the World War, see Garner, as cited.

[3] For the text of the convention, see Higgins, *op. cit.*, 8.

methods of warfare.[1] This convention is the law of the present day.[2] The chief legal problems presented by both conventions have arisen in connection with the provisions relating to the "movable sanitary formations" [3] which accompany armies in the field and to the "fixed establishments" or stationary hospitals behind the lines or at distant points.[4] The conventions pledge the belligerents to respect and protect these organizations and their personnel, together with the personnel of voluntary aid societies, on condition that they in their turn abstain from acts directly or indirectly injurious to the enemy.[5] "Convoys of evacuation" engaged in transporting sick or wounded to the rear must, with certain exceptions, be treated like the movable sanitary formations.[6] In practice, however, it has been difficult at times to determine what should constitute a breach of the "neutrality" required of Red Cross units in cases where persons have, unauthorized, put to military use their immunity from attack. Moreover, the movable formations have frequently been found in positions which impeded the military operations of the enemy, so as to make it impossible to grant them protection. Opportunities have thus been presented for charges of bad faith on both sides.[7]

e. Methods involving non-combatants: sieges and bombardments

The foregoing methods of warfare relate to the combatant armies only. In addition there are other methods which involve primarily the combatant armies, but incidentally affect the civilian population of the belligerents. Here again, to an even greater degree, the contrast is presented between accepted general principles and practice in concrete cases.[8] Customary as well as conventional law permits the attack, siege, or bombardment of villages and towns which are defended by the enemy's troops. The prac-

[1] For the text of the convention, see *ibid.*, 18; *Am. Journal*, I (1907), Supp., 201 ff.

[2] Article 21 of the Hague Regulations merely refers to the fact that "the obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention."

[3] "Mobile medical units," as Holland better translates. *Laws of War on Land*, No. 47.

[4] Art. 6-8; 14-16.

[5] Art. 6, 7.

[6] Art. 17.

[7] During the World War the use of long-range guns, and in particular the use of torpedoes at sea and of bombs dropped from air-ships, gave rise to numerous accusations of violations of the Geneva Conventions. See Garner, *op. cit.*, I, Chap. XX.

[8] The student will also observe the inconsistency of the concession to non-combatants made in one case and not in another. But this is a question not of positive law, but of constructive amendment of the law.

CHAP. XXVIII

tice of defending towns by fortifications was formerly common, and necessarily resulted in injury to the civilian population. In taking towns by assault it was difficult for the attacking force to observe the distinction between combatants and non-combatants, even where the distinction was recognized in principle. In laying siege to towns the method of reduction by starvation bore upon armed and unarmed inhabitants alike. It is still a legitimate practice to starve the enemy into submission, and it would appear that there is no obligation upon the besieging commander to permit the exit of "useless mouths" which consume supplies without contributing to the defense.[1]

Modern practice centers upon the occasion and the method of bombardment. The Hague Regulations forbid "the attack or bombardment by any means whatever, of towns, villages, dwellings, or buildings which are undefended."[2] The problem has arisen to determine what constitutes defense. Active resistance constitutes defense, although the town be unfortified. Mere occupation by the enemy appears to constitute passive defense. It is open to question whether the mere presence of munitions in an undefended town justifies bombardment in cases where the enemy finds it inconvenient as a military operation to enter the town and destroy them.[3] Before commencing bombardment the commander of the attacking force must do all in his power to warn the authorities, except, however, in cases of assault.[4] Buildings devoted to religion, art, science, and charity must be spared as far as possible, and it is the duty of the besieged to indicate those buildings by visible signs.[5] With these exceptions, both private dwellings and public buildings may be destroyed, as well as the fortifications, if any. As in cases of siege, it would appear that the enemy commander is not obliged to permit the non-combatant population of a town to leave either before or during bombardment.

Practice during the World War

During the World War the invention of new instruments of warfare brought into question the validity of the existing rules.

[1] Comp. *Instructions*, No. 18, where it is said that "it is lawful, though an extreme measure, to drive them [non-combatants] back, so as to hasten on the surrender." For a review of modern practice, see Spaight, *op. cit.*, 174 ff. The Hague Regulations are silent upon the subject.

[2] Art. 25.

[3] See Spaight, *op. cit.*, 170, where it is held that only absolute necessity justifies bombardment in such cases. Comp. Hyde, *International Law*, II, 303.

[4] Art. 26. The *U. S. Rules of Land Warfare*, following the Instructions of 1863, point out that "surprise may be a necessity," in which case there is no obligation to give warning (No. 217).

[5] Art. 27.

Omitting instances in which reprisals were offered as a ground for acknowledged violation of the law,[1] the longer range of the guns in use and the more destructive power of the shells fired made it difficult to avoid striking the buildings which the Hague Regulations declared should be spared "as far as possible." In particular, such buildings were exposed to injury from bombs dropped from air-ships, owing to the practical impossibility of taking accurate aim at great height and at great speed. Moreover, the question arose whether the concentration of troops in large centers, such as London and Paris, was sufficient to convert those cities into "defended towns" and thus subject them to bombardment from the air. Railway terminals and barracks came to be regarded as constituting proper objects of attack in spite of their location in the midst of civilian populations. The wide latitude allowed by customary law and by the Hague Regulations to the discretion of individual military commanders made it difficult to convict a belligerent of a breach of the law, even in cases where the injury committed appeared to the other belligerent to be due to gross carelessness or deliberate intent.[2] Under such circumstances the spirit of the law, as laid down in its broad principles, was lost in the exceptions permitted by a technical interpretation of its terms.

Seizure and destruction of property; pillage and devastation

The laws of war permit the seizure and destruction of enemy property by a belligerent when military necessity demands it. The earlier practice of wanton destruction complained of by Grotius has long been formally condemned in principle and is virtually obsolete in practice.[3] The Hague Regulations follow the customary law in forbidding the destruction and seizure of the enemy's property unless it be "imperatively demanded by the necessities of war."[4] The rule is thus a conditional one, and leaves to the determination of the belligerent army the circumstances under which

[1] As, for example, in the bombardment of Hartlepool by the German fleet in 1914 and the bombing of Freiburg by Allied air-ships in 1918. See Garner, *op. cit.*, I, Chap. XVII, XIX.

[2] See the evidence presented in the *Report of the Commission of Responsibilities*, Appendix I, 1919.

[3] While condemning wanton destruction, Grotius recognized the right of confiscation, going so far as to say that "by the Laws of Nations, not only he who for just cause carries on a war, but any one, in a regular war, may without limit or measure take and appropriate what belongs to the enemy." *De Jure Belli et Pacis* (Whewell's trans.), Bk. III, Chap. VI, § II. Vattel, in 1758, was scarcely less drastic in his doctrines, including private property in "enemy property" and stating that the belligerent "takes possession, when he can, of the enemy's property, and confiscates it." *Droit des Gens* (Eng. trans.), Bk. III, §§ 73, 161.

[4] Art. 23g.

military necessity demands such measures. Custom and convention have combined to draw a distinction between the right of a commander in the field to seize and destroy enemy property as an incident to offensive or defensive military operations and the limited right of an army of occupation to make use of enemy property as an incident to the effective administration of the country.[1] In the former case the right of the belligerent commander applies equally to public and to private property, and it is regularly exercised in connection with army supplies and storehouses, railways, munition factories, and other property of direct military value to the enemy. The exercise of the right with respect to property of a non-military character is more debatable. Destruction of dwellings lying in the line of fire is common practice. On occasion, as at Atlanta in 1864, whole sections of a city have been set on fire as a means of depriving the enemy of resources of food or shelter.[2] On the other hand, the burning of public buildings in Washington by British forces in 1814 has been generally condemned.[3] The Hague Regulations confirm customary law in declaring that "the giving up to pillage of a town or place, even when taken by assault, is forbidden."[4] General devastation of property as a means of covering the retreat of an army has, however, been a common practice of belligerents.

Military objectives other than direct hostilities

A more difficult problem is to determine how far the destruction of enemy property is justified, not in connection with direct hostilities, but as a means of cutting the enemy's lines of communication, or eliminating his subsequent sources of supply, or intimidating the civilian population and inducing it to bring pressure upon the government to sue for peace. In 1864 General Sherman devastated a wide area from Atlanta to the sea in pursuance of an interpretation of military necessity which included the objects above mentioned, and shortly afterward the devastation of the Shenandoah valley was carried out to the same end.[5] Devastation on a broad scale was carried out by Spain in Cuba in 1897, and, being accompanied by the measure of "concentrating" the civilian population in garrison towns, led to protests from the United States which ultimately formed part of its grounds of war.[6] In 1901, the

[1] Hague Regulations, Art. 52-53. See below, pp. 481-482.
[2] For details, see Spaight, *op. cit.*, 131, 307, 410.
[3] *Ibid.*, 112.
[4] Art. 28. Pillage in connection with military occupation is "formally forbidden" by Article 47.
[5] For details, see Spaight, 133-135.
[6] Moore, *Digest*, VI, 130.

British armies in South Africa interned the civilian population in "concentration camps," with the result of serious loss of life.[1] At the same time the country was laid waste far and wide as a means of cutting off the supplies of the guerrilla forces.[2]

During the World War the seizure and destruction of enemy property took on new forms along the western front, where the fixed lines of battle razed whole towns and villages lying in the line of fire. The partial retreat of the German troops in the spring of 1917 resulted in general devastation of the evacuated area. Owing, however, to the conditional character of the prohibitions of the law, it is difficult in these cases, as in others, to determine whether the act of destruction was in violation of technical law, even in cases where it appeared to the sufferers to be wholly arbitrary and malicious.[3]

Intimidation of the civilian population

The destruction of property as a means of intimidating the civilian population is impliedly condemned by the Hague Regulations, but it has not been wholly absent from international practice. Both Sherman and Sheridan accepted the necessity of bringing war home to the civilian population as a means of terminating more speedily the military conflict.[4] Starvation, whether by siege of towns or by general blockade of the enemy country, has long been a recognized method of breaking down the morale of the civilian population. During the World War intimidation was resorted to by Germany in the form of bombardment from air-ships and from guns of exceptionally long range; and in both cases the incidental loss of life attending the destruction of property marked a departure from even the most extreme forms of nineteenth-century usage. The motive of intimidation in these cases was, however, complicated by the attack upon London and Paris as centers of military transportation.

f. Military occupation

International law possesses a separate set of rules governing the occupation of enemy territory by a belligerent when the latter

[1] For details, see Spaight, *op. cit.*, 308.

[2] *Ibid.*, 136.

[3] Accusations made by the Allies of the wanton character of certain of the devastations are cited by Garner, *op. cit.*, Chap. XIII. See also *Report of the Commission of Responsibilities*, 44.

[4] Bordwell cites General Sherman as saying that he attached "more importance to these deep incisions into the enemy's country, because this war differs from European wars in this particular; we are not only fighting hostile armies, but a hostile people, and must make old and young, rich and poor, feel the hard hand of war, as well as their organized armies." *Law of War*, 79. Similar views of General Sheridan are also cited, p. 78. Sherman's *Memoirs*, II, 227; Sheridan's *Memoirs*, I, 486.

CHAP. XXVIII

has defeated or driven out the opposing army and has obtained, for the time being, control over the particular area. At the time Grotius wrote no distinction was made between the temporary rights of an army of occupation and the permanent rights belonging to a belligerent as the result of conquest. Armies in possession of enemy territory exercised rights of sovereignty over it, and went at times so far as to recruit their forces from among the inhabitants of the country.[1] But by the middle of the seventeenth century a distinction came to be made between the provisional authority exercised by the belligerent army and the final status of the territory as determined by the treaty of peace.[2] The army of occupation was held to exercise temporary legal authority based upon the actual fact of possessing control over the territory. The character and scope of this authority were determined, on the one hand, by the military necessities of the belligerent army and, on the other, by the human interests and welfare of the civilian population of the occupied territory. The interaction of these two objects of military occupation resulted in a series of compromises which form the present law.[3]

When occupation begins

At the outset the primary difficulty has been to determine at what moment the rights of the invader cease and those of the military occupant begin. The two opposing doctrines were shown in sharp contrast at the First and Second Hague Conferences. On the one hand, Great Britain and the smaller European states held that a country could only be said to be "occupied" when the invader had sent his troops into all parts of it, so as to be in a position to suppress upon the spot any resistance to his authority.[4] On the other hand, the larger European states having standing armies held that the legal situation of military occupation came into being so soon as the principal armies of the enemy had been defeated and overthrown.[5] The provisions adopted in the Hague Regulations show the acceptance of the first of these doctrines, and

[1] See Westlake, *International Law*, 2nd ed., II, 95, where the instance of Frederick the Great is cited.

[2] Vattel, *Droit des Gens*, III, §§ 197-198.

[3] Hyde, quoting J. E. Conner, *The Development of Belligerent Occupation*, prefers the term "belligerent occupation" as expressing more definitely the situation created by military occupation in time of war as distinct from military occupation in time of peace, such, for example, as exists in the territories along the Rhine by virtue of the Treaty of Versailles. *International Law*, II, § 688.

[4] For the connection between this theory and the status of a *levée en masse*, see above, p. 461.

[5] For details of the conflicting views, see Spaight, *op. cit.*, 326 ff.

it was laid down that "territory is considered occupied when it has actually been placed under the authority of the hostile army," and that "the occupation applies only to the territory where such authority is established and can be exercised."[1] The test of legal military occupation is, therefore, its actual effectiveness in the particular area where its legality is brought to question.

Scope of authority of the military occupant

The scope of the authority of the military occupant is, in respect to the general welfare of the civilian population, practically the same as that of the displaced government. The Hague Regulations give effect to customary law in providing that when the authority of the legitimate government has actually passed into the hands of the occupant, "the latter shall take all steps in his power to reëstablish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."[2] An obligation is therefore imposed upon the belligerent to maintain the existing civil and criminal law in so far as is compatible with the existence of a state of war and the safety of the army of occupation. Such new measures as may be enacted in accordance with the necessities of the abnormal situation possess, in respect to the citizen body, the force of law, and their observance may be secured by the imposition of such penalties as the occupant may deem necessary. While the occupant is forbidden by the Hague Regulations "to compel the population of occupied territory to take an oath of allegiance to the hostile power,"[3] he may demand of the inhabitants the same obedience and temporary loyalty to which their lawful sovereign is entitled. The authority thus set up by a belligerent in occupied territory and the acts done in the pursuance of it are technically designated as "military government," while the law enforced by the military government is known as "martial law." The latter term properly includes the whole body of rules recognized as law by the military government, including such existing law as may be retained, together with new rules, irrespective of the question whether they are enforced by the customary civil and criminal courts or by the new military courts.[4]

[1] Art. 42. [2] Art. 43. [3] Art. 45.

[4] The term "military law" is properly applied only to the law regulating the military forces themselves; but there is some variation in the use of the terms "military law" and "martial law," owing partly to the fact that martial law is also put into effect on occasion in times of peace as a measure of domestic emergency legislation. See Willoughby, *Constitutional Law*, LXI, LXII; Birkheimer, *Military Government and Martial Law*, Part II, 571-580; Hyde, *International Law*, II, § 702.

CHAP. XXVIII

Restrictions imposed upon the military occupant

In exercising the general functions of government the military occupant is confronted with a number of restrictions imposed by international law with the object of protecting the inhabitants of the territory from an abuse of the authority over which they have no control. The administration of the territory calls for the enactment of new measures adjusting the normal life of the community to the presence of an alien army in its midst;[1] and at the same time the needs of the army of occupation must be adequately provided for. In pursuance of this object, the military occupant is obligated to respect the personal and property rights of the inhabitants. He may not compel the inhabitants to take the oath of allegiance to the hostile state,[2] although he may forbid and punish severely acts coming under the head of "war treason."[3] "The lives of individuals," "family honor and rights,"[4] as well as "religious convictions and freedom of worship," must be respected.[5] This last restriction is no doubt conditional upon the absence of any attempt to make use of religious gatherings as a means of inciting the inhabitants against the authority of the occupant. The Hague Regulations forbid the belligerent "to compel the nationals of the hostile party to take part in the operations of war directed against their own country," and the restriction holds good "even when they have been in his service before the commencement of the war."[6] At the same time the belligerent as military occupant is forbidden "to force the population of occupied territories to give information about the army of the other belligerent or about his means of defense."[7] Both of these last restrictions are in advance of customary law, and precisely what acts are forbidden by them is an open question. The phrase "operations of war" was, it would appear, deliberately left vague; and while acts directly connected with military operations are forbidden, it is not clear whether the phrase includes or excludes acts indirectly connected with military operations, such as the repair of fortifications, railroads and bridges, the digging of trenches, the transportation of supplies, or the burial of the dead. It is also disputed whether the terms forbid the use of "forced guides."[8]

[1] The Hague Regulations call upon the military occupant to "take all steps in his power to reëstablish and insure, as far as possible, public order and safety while respecting, unless absolutely prevented, the laws in force in the country." Art. 43.

[2] Art. 45. General Pope's proclamation in 1862 is described by Spaight as "bad war law" as well as bad generalship. *Op. cit.*, 333.

[3] See above, p. 469. [4] That is, family relations. [5] Art. 46.

[6] Art. 23h. [7] Art. 44. [8] See Spaight, *op. cit.*, 368 ff.

Obligations toward private property

The Hague Regulations follow customary law in forbidding the confiscation of private property, as well as "pillage";[1] but they appear to go beyond customary law in requiring that private property "must be respected,"[2] unless the latter phrase can be interpreted to permit the taking of private property by way of requisition and contribution. As an incident to the general administration of the territory, the occupant may levy taxes "in accordance with the rules of assessment and incidence in force,"[3] and must apply the receipts, at least in part, to the expenses of the administration.[4] In addition to taxes, practice sanctions the levying of "contributions," which consist in forced exactions of money payments.[5] Customary law forbids the levying of contributions for the mere purpose of enriching the treasury of the government of the military occupant, and the Hague Regulations confirm the rule by requiring that contributions, if levied, "can be only for the needs of the army[6] or of the administration of such territory."[7] Moreover, they require that "no contribution shall be collected except upon a written order, and on the responsibility of a Commander in chief," and that the collection "shall only take place, as far as possible, in accordance with the rules in force for the assessment and incidence of taxes," and, further, that "for every contribution a receipt shall be given to the contributors."[8]

Collective responsibility for acts of individuals

A special difficulty is presented by the custom of imposing fines upon the community as a means of preventing offenses, such as the destruction of railways, telegraph lines, and bridges, forbidden by the martial law of the occupant. The rule of holding the com-

[1] Art. 46, 47. It should be observed that there is no exemption accorded to *public* property of a form capable of being confiscated or utilized. See *Regulations,* Art. 53, and compare *Instructions,* No. 31.

[2] Art. 46.

[3] Art. 48. The Regulations refrain from giving the belligerent a "right" to levy taxes, but practice would appear to support it.

[4] Art. 48. The Regulations require that this be done "on the same scale as that to which the legitimate government was bound." The *U. S. Rules of Land Warfare* merely require that "the first charge upon the State taxes is for the cost of local maintenance. The balance may be used for the purposes of the occupant." No. 310.

[5] Moore quotes the striking statement of President Polk in 1848 that "no principle is better established than that a nation at war has the right of shifting the burden off itself and imposing it on the enemy by exacting military contributions." *Digest,* VII, 285.

[6] The phrase is, and was intended to be, an elastic one!

[7] Art. 49.

[8] Art. 51. It should be observed that the receipts given do not involve a promise to make compensation. They are merely evidence of payment, to be recognized or not at the close of the war according to the provisions of the treaty of peace.

munity collectively responsible for the acts of individuals is well established in principle, although subject to abuses in practice.[1] The Hague Regulations embody an agreement that "no general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible";[2] but the phrasing of the restriction is in such vague terms as to leave it uncertain whether the community may or may not be "regarded as collectively responsible" for acts which its coöperation would help greatly to prevent and which it may, therefore, be held to permit impliedly by not preventing.[3] The Regulations would, however, appear to require that the offense must at least be committed in the locality of the community, and not merely by a member of it.

Requisitions

Customary law gives to a military occupant the right to provide for the immediate needs of the army of occupation by drawing upon the supplies of the local population. These supplies, known as "requisitions in kind," may consist of articles of more direct military use, such as horses, wagons, automobiles, or articles of general use, such as food, clothing, houses, machinery, etc. Requisitions are distinguished from mere booty or plunder by the fact that they must be limited to the immediate needs of the local detachment as distinct from the belligerent forces as a whole, and that they are collected more or less systematically so as to distribute the burden upon the local community. The Hague Regulations confirm the necessity of limiting the demands made to the needs of the army of occupation, and require further that "they shall be in proportion to the resources of the country."[4] Recent practice indicates recognition of the principle that less injustice will be done to the population if the military occupant puts his measures into effect with the aid of the local authorities.[5] The necessity of

[1] See Spaight, *op. cit.*, 408.

[2] Art. 50. The official translation of 1907 varies from that of 1899, although the official French text is the same.

[3] The student of constitutional law may make comparison with the practice resorted to by certain States of the United States of holding municipalities responsible for losses incurred as the result of mob violence. See, for example, Chicago *v.* Sturges, 222 U. S., 313 (1911). The *U. S. Rules of Land Warfare* warrant a military occupant in inflicting collective punishments "for such offenses as the community has committed or permitted to be committed." (Art. 354.)

[4] Art. 52.

[5] During the American Civil War the direct method of "foraging" was justified by General Sherman on the ground that "the country was sparsely settled, with no magistrates or civil authorities, who could respond to requisitions, as is done in all wars in Europe." *U. S. Rules of Land Warfare*, No. 347, n. 2.

making payment for supplies taken has likewise been recognized within recent years, but the obligation is conditional upon the convenience of the local commander. The Hague Regulations merely provide that "contributions in kind shall, as far as possible, be paid for in cash"; and where this cannot be done "a receipt shall be given, and the payment of the amount due shall be made as soon as possible."[1] The indefiniteness of the obligation marks little or no advancement upon the prevailing practice. In addition to "requisitions in kind," the military occupant may make demands upon the services of the inhabitants for the performance of manual or skilled labor in connection with the needs of the army and the general administration of the territory. The Hague Regulations confirm recent custom in prescribing that such services may not "involve the inhabitants in the obligation of taking part in military operations against their country."[2] The Regulations further provide that both requisitions and services "shall only be demanded on the authority of the commander in the locality occupied."[3]

Practice during the World War

The exceptional conditions attending the military occupation of Belgium and northeastern France during the World War put both the customary and the conventional law of military occupation to a severe strain. The transition from the invasion of the country to its occupation was effected with such rapidity as to call for extreme measures in suppressing local resistance. Hostages were taken in many places[4] and heavy fines were imposed upon towns and villages in punishment of acts of hostility committed by non-combatants.[5] The provision of the Hague Regulations exempting the community from responsibility for acts of individuals beyond their control was freely interpreted.[6] The practice of deporting a part of the civilian population for the purpose of forcing them to labor in German factories and mines and thus release German workers for service in the army was in violation of the provision of the Hague Regulations that the requisition of services should only be for the needs of the army of occupation, although it

[1] Art. 52. [2] *Ibid.* See above, p. 480. [3] *Ibid.*

[4] See Garner, *op. cit.*, I, §§ 195-201.

[5] *Ibid.*, II, §§ 403-412.

[6] As Hyde points out, "as yet there is no accepted or uniform method of determining under what circumstances the act of the individual is to be regarded as one for the commission of which a community should be deemed collectively responsible." (*International Law*, II, § 692.) The German military commanders were thus left largely to their personal interpretation of their obligation.

CHAP. XXVIII

was not specifically covered by customary law.[1] Likewise the deportation of women from Lille for the same purpose was unprecedented, but not specifically provided against.[2] The limitation of supplies to the needs of the local army was set aside in the presence of the general shortage of raw materials in Germany, and every available source of supply was drawn upon. On the part of Germany justification for these measures was offered in the new circumstances with which the country was faced. The danger to the army of a hostile population in its rear called for severe repressive measures, while the enveloping blockade of the country maintained by the Allied armies and navies offered not only an excuse for correspondingly drastic measures of readjustment on the part of Germany, but, being considered as illegally conducted, gave ground of reprisals which made the question of law a matter of indifference.[3]

g. Intercourse between belligerents: indirect communication

Owing to the development of modern means of communication, recent wars have witnessed a considerable amount of non-hostile intercourse carried on between the belligerent governments through the agency of neutral diplomatic representatives. Each belligerent transmits to the particular neutral diplomatic representative in charge of its interests such communications as it desires to have forwarded to the other belligerent, and replies are made through the same indirect channel. These communications relate to such matters as proposals for new agreements with respect to the conduct of hostilities or the status of alien enemy citizens, and particularly to complaints and protests by one belligerent against the violation of the laws of war by the other belligerent, accompanied by the threat of reprisals. Occasionally a neutral state, as the United States in 1915 and 1916, has gone so far as to intervene between the belligerents with a suggestion as to the method of conducting hostilities.[4] During the World War indirect intercourse was carried on upon a large scale.

Direct intercourse

Direct intercourse between commanders in the field has always been an incident of warfare, and has been surrounded from the earliest times by special sanctions. The personal inviolability of

[1] It might be said, however, to have been covered by implication.

[2] For the circumstances attending this measure, see *The Deportation of Women and Girls from Lille* (a translation of the note addressed by the French Government to neutral governments). See also *Report of the Commission of Responsibilities*, Appendix I.

[3] See the correspondence between Secretary Lansing and the American *chargé d'affaires* at Berlin, *Am. White Book*, IV, 357-373.

[4] See *Am. White Book*, I, 59; III, 162, 188.

the bearer of a flag of truce ranks, with the good faith of treaties, as one of the oldest and best recognized rules of international law. The Hague Regulations follow custom in extending the inviolability of the bearer of a flag of truce[1] to "the trumpeter, bugler or drummer, the flag bearer and interpreter who may accompany him."[2] Both custom and convention[3] justify a commander in refusing to receive the bearer of a flag of truce, when to do so might endanger the success of pending military operations. It is a disputed question whether a commander may give notice in advance that flags of truce will not be recognized during a specified period; the United States Rules of Land Warfare declare against such notification,[4] while the British and German rules sanction the practice. The Hague Regulations authorize the enemy commander to take all steps necessary, such as blindfolding the person, "to prevent the parlementaire taking advantage of his mission to obtain information," and in case of abuse "he has the right to detain the parlementaire temporarily."[5] Moreover, "the parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason."[6] The abuse of a flag of truce by an army which sends it, as, for example, the act of firing upon those who come forward to receive it, is an offense of the most serious character, and as a rule gives rise to reprisals.[7] The provision of the Hague Regulations forbidding a belligerent "to make improper use of a flag of truce," among other forms of deceit, seems to weaken rather than strengthen the well established rule.[8]

Agreements between belligerents

Informal agreements frequently take place between belligerents for the adjustment of minor questions relating to the conduct of hostilities, and they are governed by the same rule of good faith

[1] The term *parlementaire* is preferable, owing to the fact that the agent or envoy sent by the belligerent commander is not actually the bearer of the flag of truce. It is sanctioned by *U. S. Rules of Land Warfare*, No. 235.

[2] Art. 32. [3] Hague Regulations, Art. 33.

[4] No. 244. [5] Art. 33. [6] Art. 34.

[7] For cases occurring during the World War, see *Report of the Commission of Responsibilities*, 57.

[8] Art. 23f. Passports, or safe-conducts, and safeguards are commonly classed under the heading of "intercourse between belligerents"; but it should be observed that these agreements are as a rule entered into not between the belligerents themselves, but between one belligerent and citizens of the enemy state. A *passport* or *safe-conduct* entitles the bearer to pass unmolested within the territory occupied by the enemy. A *safeguard* is a notification from a commander to persons lower in command, or to his successor, that certain buildings have been granted special protection. The term is also applied to the guard stationed by a commander to protect particular buildings and houses.

applicable to treaties. Formal agreements fall into three general classes: cartels, capitulations, and armistices. *Cartels* are agreements entered into by belligerents for a variety of purposes, the chief of which is the exchange of prisoners of war.[1] *Capitulations* are agreements for the surrender of a town or fortress, or of a body of troops operating within a particular district. While the details of the surrender are left to the free agreement of the parties, international law intervenes to impose special conditions based upon the circumstances under which such agreements are concluded. The Hague Regulations follow custom in requiring that the terms of the capitulation "must take into account the rules of military honor"; that is, they must contain nothing personally degrading to the force which surrenders. Moreover, the terms, once settled, must be "scrupulously observed by both parties."[2]

A special difficulty arises in determining whether the terms of the surrender come within the implied authority of the contracting officers. This difficulty was formerly of great consequence, in view of the impossibility on the part of the commanders of obtaining adequate instructions from their home governments. The term "sponsions" was applied to such capitulations entered into in excess of the authority of the officer making them and upon the mere hope of subsequent ratification. Vattel cites the classic instance of the agreement made by the Roman consul with the Samnites at the Caudine Forks, the terms being later repudiated by the Roman Senate.[3] At the close of the American Civil War General Sherman stipulated in an agreement of surrender with General Johnston that the several state governments should be recognized, and that the people of the Confederate States should be guaranteed their political rights and franchises as citizens of the Union.[4] Since these terms were political in their nature and extended beyond the sphere of military operations intrusted to General Sherman, the Government of the United States did not consider itself bound by his act. Should the defeated general on his part undertake to cede territory or to bind his government in

[1] Hall enumerates, among other objects of cartels, provision for postal and telegraphic communication, when such communication is allowed to continue, the mode of reception of bearers of flags of truce, and the treatment of the wounded and of prisoners; but military usage appears to limit the term to the exchange of prisoners. See *U. S. Rules of Land Warfare*, No. 284.

[2] Art. 35.

[3] *Droit des Gens*, II, § 209.

[4] For details, see Rhodes, *History of the United States*, V, 166.

non-military matters, his agreement would be in like manner voidable.[1]

Agreements between belligerents for the temporary suspension of hostilities figure among the oldest rules of the law of war, and numerous practical problems have arisen in connection with their application and interpretation. Usage is not uniform with respect to the terms employed to designate these agreements, but the term "suspension of arms" is more often used to designate agreements between local commanders for a brief suspension of hostilities for such purposes as the removal of the wounded or the burial of the dead, while the terms "armistice" and "truce" are used interchangeably to indicate agreements of longer duration and more comprehensive purpose. All three terms are used to designate both the agreement itself and the period of cessation of hostilities for which it provides. The Hague Regulations distinguish between general and local armistices: "The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius."[2] The terms of the armistice regularly fix the precise time at which it is to commence and at which it is to terminate; and the rule of good faith is held to apply with special force to the observance of the spirit as well as the letter of the agreement.[3] When hostilities are to be suspended immediately after notification, it is particularly important that the notification to the competent authorities and to the troops be made officially and in good time, and this obligation is stressed by the Hague Regulations.[4] The Regulations further provide that if the duration of the armistice "is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.[5]

After long controversy and conflicting practice, the question remains unsettled as to what acts, other than actual hostilities, are permissible during the duration of an armistice. Since the legal state of war continues unaffected by the armistice, inference from general principles would seem to require that the belligerents refrain from preparations for offense and defense only in so far as the terms of the armistice expressly prohibit such acts. Grotius

[1] For a description of the subjects usually regulated by capitulations, see *U. S. Rules of Land Warfare*, No. 254.

[2] Art. 37. The terms "general truce" and "special truce" are also in use.

[3] See Vattel, *Droit des Gens*, III, § 244.

[4] Art. 38.

[5] Art. 36.

thought it permissible to perform such acts as the erection of defenses, the repair of fortifications, and the concentration or withdrawal of troops within the area of the armistice.[1] On the other hand, the influence of Vattel was thrown in favor of the principle that there should be no alteration of the status quo along the line where the forces faced each other, and that no act should be done which could not have been done had the armistice not taken place.[2] The United States Rules of Land Warfare follow the view that anything may be done during the armistice which is not in express terms prohibited by the agreement.[3] Considerable controversy has also taken place over the question as to what constitutes a violation of an armistice, and what rights accrue to the other party after such violation. Practice has shown that a belligerent not acting in good faith may take advantage of a minor breach of the agreement to commence hostilities unexpectedly and take his enemy by surprise. The Hague Regulations impliedly distinguish between serious and lesser violations, and between violations by an entire body of troops and violations by irresponsible individuals. It is provided that "any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately."[4] Further, "a violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders, or, if necessary, compensation for the losses sustained."[5]

There appears to be no definite rule of customary law covering the relations, during the armistice, between the belligerent army and the population of occupied territory, as well as between the population of occupied territory and their fellow-citizens in territory held by the *de jure* government. Since the legal effects of the state of war continue, the presumption should be that the rights of the military occupant toward the inhabitants, in the absence of special agreement, remain unchanged, and that the inhabitants are in turn precluded from intercourse with their *de jure* government and the territory under its control. The Hague Regulations call special attention to the fact that "it rests with the Contracting Parties to settle, in the terms of the armistice, what communications may be held in the theatre of war with the

[1] *De Jure Belli et Pacis*, Bk. III, Chap. XXI, § VII.
[2] *Droit des Gens*, III, § 245.
[3] No. 261. [4] Art. 40. [5] Art. 41.

inhabitants and between the inhabitants of one belligerent State and those of the other.'' [1]

The armistice of November 11, 1918

The agreement which came into effect on November 11, 1918, between the Allied and Associated Powers and Germany, while designated as an ''armistice'' and conforming in its technical character to the pattern of a general armistice, was in the substance of its terms a capitulation. On the one hand, it was an agreement entered upon for the cessation of hostilities during a specified period of thirty-six days, with option of extension; and provision was made for its denunciation in case of non-execution, giving the injured party the right to renew hostilities. Moreover, the correspondence preceding the agreement stipulated that the treaty of peace which was to follow the armistice should be concluded upon certain definite principles known as the ''fourteen points,'' with the exception of one point to which the Allied Powers made exception. On the other hand, the agreement contained military conditions which made it practically impossible for Germany to renew hostilities, whatever might be the final terms of peace with which she might be presented. Germany was required, among other things, to evacuate occupied territory, to surrender specified war material, to repatriate, without reciprocity, prisoners of war, and to acknowledge the obligation of making reparation for damage done. On the side of the Allied and Associated Powers, the armistice permitted the occupation of designated German territory of strategic importance as a guarantee of the fulfilment of the terms of the armistice, as well as the continued blockade of Germany by land and sea. Similar in character were the provisions of the armistice between the Allied and Associated Powers and Austria-Hungary, November 3, 1918. In both cases the agreements amounted in fact to a surrender upon terms.[2]

h. Reprisals as a sanction against unlawful conduct

A survival in the laws of war of the complete lawlessness of earlier times is to be seen in the practice of *reprisals* or *retaliation* as a sanction to prevent the continuation or recurrence of viola-

[1] Art. 39. There is dispute as to the meaning of the French phrase, *avec les populations et entre elles*, other versions reading ''with the populations and with each other,'' ''with and between the populations.'' The latter, offered by Spaight (*op. cit.*, 232), has met with favorable comment. The present writer suggests ''between the army and the inhabitants and between the inhabitants themselves on both sides of the line.''

[2] For the texts of the armistices, see *Am. Journal*, XIII (1919), Supp., 80, 97. For the question as to whether the terms of the Treaty of Versailles were consistent with the terms of the armistice of November 11, see L. Rogers, ''The Relation of the Armistice and the Treaty of Versailles,'' *Proceedings*, Am. Society of Int. Law, 1923, 90-96.

tions of the law. A serious offense is committed by one of the belligerents. The other belligerent thereupon orders that corresponding measures in excess of the law be taken as a means of impressing upon the other party the necessity of observing the law. In its turn the other belligerent, considering that the measures taken by way of retaliation are more severe than is warranted by the circumstances, puts into effect still more drastic measures, until the original offense is lost in a vicious circle of charges and counter-charges.

Their legality

All of the national war codes appear to recognize the necessity of resorting to reprisals.[1] The complete failure of the efforts at the Brussels Conference of 1874 to regulate them made it seem inadvisable at the Hague Conferences of 1899 and 1907 to reopen the question. Such rules as exist, therefore, are based upon practices too variable to permit the inference of an established custom. In general it may be said that reprisals are not resorted to as a means of punishment or revenge, but only as a means of securing the observance of the laws of war for the future. Hence the method of retaliation need not be identical with that of the offense, although it generally assumes a form approximating the latter in order that the relation between the two acts may be made more apparent. Again, since it is not as a rule possible to reach the guilty parties, retaliation may be carried out against enemy prisoners or others who have been guilty of no offense themselves.[2] Owing to the grave character of the measures, it is generally prescribed that reprisals may only be ordered by a commanding officer, following a careful investigation of the act complained of.

Reprisals directed against non-combatants

The extent to which reprisals may be put into effect against non-combatants has been much debated as a matter of abstract justice, but in point of law it seems clear that non-combatants may claim no exemption. The burning of towns and villages has been a common form of retaliation.[3] So also has been the practice of carrying off hostages, which assumed large proportions during the occupation of Belgium in 1914. A special form of protection against possible unlawful conduct has been the practice of "pro-

[1] See, for example, *Instructions*, Nos. 27, 28; *Rules of Land Warfare*, No. 381. The Oxford Manual of 1880 offered two brief articles regulating reprisals. See *Resolutions of Institute of International Law*, 42.

[2] "All prisoners of war are liable to the infliction of retaliatory measures." *Instructions*, No. 59. For practice during the World War, see Garner, *op. cit.*, II, §§ 349, 355, 357.

[3] For the reprisals put into effect by the United States and Great Britain in the war of 1812-14, see Moore, *Digest*, VII, 183 ff.

phylactic reprisals," by which enemy prisoners or non-combatants have been made to search for hidden mines or bombs, or to ride on the tender of railway trains, or to stand in the middle of a suspected bridge.[1]

During the World War the resort to reprisals confused at almost every turn the discussion of the legality of the conduct which gave rise to them. On both sides measures were taken which could only be defended by charging that the enemy had been guilty of other acts equally in excess of the law. The rules of blockade were extended, the submarine made war upon merchant shipping, airships bombed cities, and poisonous gases were resorted to, the ground of justification being the necessity of coercing the other belligerent to desist from other unlawful practices. A distinct question was presented in the position taken by the United States that measures of reprisal put into effect by belligerents must not affect injuriously the rights of neutrals.[2]

[1] For instances, see Spaight, *War Rights on Land*, 462 ff.

[2] See the correspondence between the United States and Great Britain concerning the blockade decree of March 1, 1915. *Am. White Book*, I, 61 ff.; III, 25. See also Sir E. Richards, "British Prize Courts and the War," *British Year Book*, 1920-21, 29 ff.; Stowell and Munro, *Cases*, II, 559, 608.

CHAPTER XXIX

THE LAWS OF MARITIME WARFARE

a. General aspects of the laws of maritime warfare

The laws of maritime warfare follow the general lines of the laws of war on land. Custom and convention have found it convenient to place them in a class by themselves, owing to the fact that they present special problems of their own and contain, in a few striking instances, principles not applied in land warfare. The sources from which the laws of maritime warfare are drawn are primarily the established customs of maritime powers, and secondarily the several international conventions adopted at the Second Hague Conference. While it was not found possible at either of the two Hague Conferences to adopt a general convention covering the rules of maritime warfare in the same comprehensive way in which the laws of warfare on land were covered, several special conventions were adopted which attempted to regulate limited portions of the field of maritime warfare. Having failed to reach an agreement upon a general convention, the Hague Conference of 1907, in the final act in which the results of the meeting were summed up, expressed the wish, among others, that "the preparation of regulations relative to the laws and customs of naval warfare should figure in the program of the next Conference, and that in any case the Powers may apply, as far as possible, to war by sea the principles of the Convention relative to the laws and customs of war on land."[1] While the "wishes" of the Hague Conference had no strictly legal validity, the wish above cited created at least a presumptive ground of justice for claims based upon inferences from the laws of land warfare where the existing usage of maritime warfare was not clear. During the World War the special conventions adopted at the Hague[2] were, like others

[1] Malloy, Treaties, II, 2369; *Hague Conventions*, 29.

[2] These included the Convention relating to the Conversion of Merchant Ships into Warships (No. VII), the Convention relative to the Laying of Automatic Submarine Contact Mines (No. VIII), the Convention concerning Bombardment by Naval Forces in Time of War (No. IX), the Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention (No. X), and the Convention relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War (No. XI).

adopted at the same conference, not technically binding, owing to the failure of some of the belligerents to ratify them; but in so far as they embodied customary rules of warfare their individual provisions were binding upon that ground; and in cases where there was no clear rule of custom the provisions of the several conventions remained as evidence of what was regarded by the international community as the substantially just rule by inference from general principles.[1]

b. Lawful combatants: privateers

The question of who may lawfully engage in hostilities at sea has been no less a subject of controversy than the question of who may be lawful combatants in war on land.[2] Down to 1856 there was no doubt that a belligerent might supplement its public armed vessels by accepting the volunteer services of privately owned and privately manned ships. These vessels, when properly commissioned by the state by the issuance of a *letter of marque*,[3] were known as *privateers*, and they might include vessels owned and manned by citizens of either the belligerent state or neutral states. The prevailing rule of national law which rewarded the privateer by granting it a property right in the prizes taken by it provided the inducement needed. Following the Crimean War, in which the Allied powers refrained from issuing letters of marque,[4] the conference at Paris put forth the Declaration of Paris of April 16, 1856, in which, in consideration of the fact that "maritime law, in time of war, has long been the subject of deplorable disputes," the contracting parties agreed, among other things, that "privateering is and remains abolished."[5] The United States, although represented at the conference, was unwilling to sign the agreement in view of the failure of the conference to accept the Marcy Amend-

[1] It is important to observe that the chief practical difficulty that has arisen in connection with the rights of belligerents in maritime warfare has been the question as to what extent rules sanctioned by custom have been invalidated by a change of circumstances. In maritime warfare, more, doubtless, than in any other field, the change of circumstances within the past fifty years has been so fundamental as to call into question numerous rules with respect to which custom had established a relatively clear rule. See below, pp. 497, 512, 514.

[2] See above, p. 460.

[3] The term as applied to commissions issued in time of war is to be distinguished from the *letter of marque and reprisal* issued in time of peace, and occasionally in time of war, to private vessels empowering them to make reprisals upon the merchant ships of a state from which they had suffered wrong. See above, p. 421, n. 4.

[4] The motive for this action on the part of Great Britain and France was apparently the fear lest the subjects of neutral states, the United States in particular, might place their vessels at the disposal of Russia. See Moore, *Digest*, VII, 538 ff.

[5] Art. I. For the text of the declaration, see Higgins, *op. cit.*, 1.

CHAP. XXIX

ment providing for the abolition of the rule permitting a belligerent to capture on the high seas the private property, apart from contraband, of citizens of the belligerent state.[1] The declaration was subsequently acceded to by the majority of states, including all of the European Powers. The United States on its part refrained from the use of privateers during the Civil War of 1861-65, and again during the Spanish-American War of 1898. On the latter occasion the American secretary of state, without waiting to learn the views of the enemy government, announced that the "policy" of the United States would be not to resort to privateering.[2]

Conversion of merchant ships into warships

A change of conditions toward the close of the nineteenth century reopened the question of the use by a belligerent for purposes of warfare of vessels previously belonging to its merchant marine. In 1870, at the beginning of the Franco-Prussian War, the North German Confederation, in default of war vessels, sought to create a volunteer fleet by chartering privately owned vessels and placing them and their crews under the discipline and command of the German navy.[3] While the plan was abandoned, a similar one was put into effect by Russia in 1877. Thereafter Great Britain, France, the United States, and other states entered into arrangements with private steamship companies providing for the transfer of their vessels to their governments upon the outbreak of war. In 1904 the capture of the British steamship *Malacca*[4] by a Russian vessel, the *Peterburg*, which had passed through the Bosphorus and Dardanelles[5] disguised as a merchantman, raised in acute form the question of the conversion of merchant ships into warships, with the result that the subject was brought up for consideration at the Hague Conference of 1907. The conference adopted the Convention (VII) relating to the Conversion of Merchant Ships into Warships, which defines the conditions under which the conversion may be effected.[6] The convention made it clear that there was to be no revival of the old practice of privateering, with its lack of discipline and responsibility, by providing that "a merchant ship converted into a war-ship cannot have the rights and duties accruing to such vessels unless it is placed under the direct

[1] See below, p. 505.
[2] Moore, *Digest*, VII, 541.
[3] See Higgins, *op. cit.*, 312 ff.
[4] For details, see Hershey, *International Law and Diplomacy of the Russo-Japanese War*, 151.
[5] These bodies of water were closed to men-of-war. See above, p. 271.
[6] For the text of the convention, see *Hague Conventions*, 146.

authority, immediate control, and responsibility of the Power whose flag it flies."[1] Subsequent articles provided that such ships must bear the external marks of warships, that the commander must be in the service of the state and duly commissioned, that the crew must be subject to military discipline, and that the converted ship must observe the laws and customs of war, and must be announced by the belligerent in the list of the ships of its military fleet.[2] The convention was not signed by the United States, on the ground that signature would amount to an implied adhesion to the clause of the Declaration of Paris concerning the abolition of privateering —a step which the United States was prepared to take only on condition of the inviolability of private property on the high seas.[3]

Conversion on the high seas: reconversion

Two controversial questions were left unsettled by the Hague Convention, as well as by the subsequent London Naval Conference of 1908-09. Accepting the legality of the conversion of merchant ships into warships, where may the conversion take place? On the one side, Great Britain, Japan, and the United States held that the conversion must occur either in the territorial waters of the belligerent or in territorial waters occupied by it. On the other side, France, Germany, and Russia insisted that the existing law permitted such conversions on the high seas, and they were unwilling to recede from their rights in that respect.[4] The conference announced in the preamble to the convention that this question "remains outside the scope of this agreement and is in no way affected by the following rules." Had it been possible to reach an agreement upon the main issue, the question of "reconversion," i.e., whether a merchant ship which has been converted into a warship may put off that character and become again a merchant ship, would apparently have been settled in the negative.[5]

Status of armed merchant ships

Distinct from the vessel of war, whether such by original construction or by conversion from a merchant ship, is the merchant ship which is armed for self-defense without losing its character as a private commercial vessel and non-combatant. By customary law, originating in the days of privateers and pirates, merchant

[1] Art. 1. [2] Art. 2-7.

[3] See Scott, *The Hague Peace Conferences*, I, 568-576; *American Instructions and Report*, 110.

[4] For details of the divergent views, see Higgins, *War and the Private Citizen*, 136 ff.; *The Hague Peace Conferences*, 312 ff. The student will observe that in this case, as in a number of others, the divergent attitudes of the leading maritime powers bore an intimate relation to the question of overseas possessions and the number of ports of asylum available in time of war. Compare below, pp. 557 ff.

[5] See Report of M. Renault in *Reports to Hague Conferences*, 592 ff.

CHAP. XXIX

ships were permitted to arm themselves against attack and might, if they considered it expedient, resist capture on the high seas. In the case of the *Nereide*,[1] the court adverted to the fact that "a belligerent merchant vessel rarely sails unarmed," and that "a belligerent [merchant vessel] has a perfect right to arm in his own defense."[2] Such a vessel, said the court, was "an open and declared belligerent; claiming all the rights, and subject to all the dangers of the belligerent character." While it might be attacked at sight, warning was usually given in the hope that the vessel might decide not to resist in the presence of a vessel of presumably superior force. The penalty of unsuccessful resistance was none other than the injuries sustained in consequence of it, and the detention of the master and crew as prisoners of war. The passengers were regarded as innocent bystanders, having no ground of complaint for injuries received, and not subject to detention as prisoners. It was important, however, that the armed merchant vessel should in no case act as the aggressor. To do so would, in the absence of a commission from its government as a privateer, place it in the class of unlawful combatants subject to the penalties imposed upon freebooters and pirates.[3]

Not subject to attack at sight

The practical effect of the distinction between such defensively armed vessels and vessels of war was seen in the rule that the former were not subject to attack at sight but only upon show of resistance; and that where no resistance was shown they were to be visited and searched to determine their character and disposed of without injury to crew or passengers.[4] The ground of this rule was apparently the fact that while resistance to men-of-war would be futile, the resistance of merchant vessels to privateers no better armed than themselves was to be expected. During the second half of the nineteenth century the disappearance of privateers and the superior armament of men-of-war led to abandonment of the practice of arming merchant vessels. But the right to arm them was still asserted, and, in view of the new practice of converting merchant ships into warships, its further exercise was predicted.[5]

[1] 9 Cranch, 388 (1815). Scott, *Cases*, 1014; Evans, 544.

[2] The case is more specifically referred to in connection with the law of neutrality. See below, p. 533.

[3] The status of such a vessel would be similar to that of individuals who commit hostilities without authorization. See above, p. 460.

[4] See below, p. 511. For the further question as to the status of defensively armed merchant vessels in neutral ports, see below, p. 559.

[5] See statement of Winston Churchill before House of Commons, March 26, 1913. *Am. White Book*, III, 169.

Defensive armament and the submarine

The introduction by Germany of the submarine as an instrument of naval warfare reopened the question of the status of defensively armed merchant ships. The submarine, while secure beneath the surface, was vulnerable upon the surface, and might readily be engaged by a merchant vessel with such armament as it could carry. On the other hand, the possibility of such effective resistance made it impracticable for the submarine to give the customary warning before attack. In consequence, Germany asserted that armed resistance by merchant vessels to German cruisers was "contrary to international law."[1] The German position thus made the resistance of armed merchant ships illegal; while, on its side, Great Britain instructed its commanders not merely to resist attack, but to take the offensive against the submarine, in view of the fact that these craft had on previous occasions failed to give warning before launching their torpedoes.[2] The argument thus ran in a circle; and the question of reprisals entered to complicate still further the respective rights of the parties.

Execution of Captain Fryatt

A corollary to the question of the legality of resistance to capture on the part of armed merchant ships was the question of a similar right of resistance on the part of an unarmed ship. On July 28, 1916, the German Government announced the execution of Captain Fryatt, commander of an unarmed British steamer, the *Brussels,* who, on March 20, 1916, had attempted to ram a submarine which had summoned his vessel to stop and show its flag. Captain Fryatt was subsequently captured and condemned to death on the ground that, since he was not a member of a combatant force, he had committed an act of hostility against a German war-vessel and was guilty of the crime of being a *franc-tireur* at sea. The British Government denounced the act as an "atrocious crime against the law of nations and the usages of war," asserting on a later occasion that there was no distinction between the rights of an unarmed and an armed vessel, and that the only restriction upon either was that it "must not seek out an enemy in order to attack him." It was admitted to the German court by Captain Fryatt that he had acted in accordance with the instructions of the British Admiralty.[3]

[1] Memorandum of October 13, 1914. *Am. White Book,* III, 171. See below, p. 514.

[2] Instructions of October 20, 1915. See Garner, *op. cit.,* I, 396-397. The earlier instructions are annexed to the German memorandum of February 8, 1916. *Am. White Book,* III, 167.

[3] For details of the case and a discussion of its merits, see Garner, *op. cit.,* I, 407 ff.; Scott, "The Execution of Captain Fryatt," *Am. Journal,* X (1916),

CHAP. XXIX

Case of the *Baralong*

In consequence of the methods pursued by German submarines against British merchant vessels, public opinion in Great Britain freely denounced the submarine as a pirate to which the laws of war no longer applied. This attitude was apparently reflected in the *Baralong* incident. On December 6, 1915, the German Government submitted to the United States Government a memorandum stating that on August 19, 1915, while a German submarine was firing upon the British merchant ship *Nicosian*, from which the entire crew had first been removed, a British cruiser, the *Baralong*, approached in the disguise of an American merchant vessel and upon reaching a strategic position fired upon the submarine, and after sinking it continued to shoot at and kill the officers and crew of the submarine while they were struggling in the water. The German Government, it was said, looked to the British Government to punish the authors of the "terrible deed," and announced that "should they be disappointed in this expectation, they would consider themselves obligated to take serious decisions as to retribution for the unpunished crime."[1]

Status of officers and crew of captured vessels

Under customary law the officers and crews of captured enemy merchant ships were made prisoners of war. This rule applied whether or not the merchant ship had offered resistance to capture, and, moreover, took no account of the nationality of the person, whether enemy or neutral. The ground for this distinction between the treatment accorded to non-combatants in war on land and non-combatants at sea was the fact that the officers and crew of merchant ships were by their training prepared for service on ships of war or auxiliary vessels, and the merchant ships themselves were readily convertible into warships. At the Hague Conference of 1907 it was proposed in the first instance to relieve sailors of neutral nationality from being made prisoners; and this proposal was later extended to include sailors of enemy nationality. The Convention relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War provides that "when an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral state are not made prisoners of war"; and the rule was held to apply to officers as well if they promised

865. Compare memorandum of Secretary Lansing, March 25, 1916, II, (11); *Am. White Book*, III, 192.

[1] For a summary of the correspondence, see Stowell and Munro, *Cases*, II, 218 ff.

in writing not to serve on an enemy ship while the war lasted.[1] A similar exemption was accorded to nationals of the enemy state, provided the crew and officers alike made "a formal promise in writing, not to undertake, while hostilities last, any service connected with the operations of the war."[2] The names of prisoners of war released under such conditions were to be communicated to the other belligerent, who was forbidden knowingly to employ the persons designated.[3] These provisions were held, however, not to apply to "ships taking part in hostilities,"[4] a vague term including, doubtless, ships resisting capture, and, perhaps, ships acting as auxiliaries to men-of-war.

c. Instruments of maritime warfare: automatic contact mines

Until the beginning of the twentieth century no special problems were presented by the instruments of maritime warfare. The restrictions in force for war on land applied in principle to war at sea, but few definite issues were raised. During the Russso-Japanese War of 1904-05 the use by both parties of floating mines raised the question of a restriction upon such instruments, owing to the injury which they were capable of inflicting upon neutral and non-combatant ships.[5] At the Hague Conference of 1907 the Convention relative to the Laying of Automatic Submarine Contact Mines was adopted, in which the contracting parties, recognizing that "the existing position of affairs" made it impossible to forbid the employment of such mines, sought to restrict and regulate their use both to mitigate the severity of war and to protect, as far as possible, peaceful navigation.[6] A distinction was made by the convention between anchored and unanchored mines. The latter might not be laid "except when they are so constructed as to become harmless one hour at the most after the person who laid them ceases to control them."[7] With this prohibition was included one against using torpedoes "which do not become harmless when they have missed their mark." In the case of the anchored mines an absolute prohibition was laid against such as do not "become harmless as soon as they have broken loose from their moorings."[8]

[1] Art. 5. For the text of the convention, see Malloy, *Treaties*, II, 2341; *Hague Conventions*, 182.

[2] Art. 6. [3] Art. 7.

[4] Art. 8. For the case of the American prisoners of war taken to Germany on the prize-ship *Yarrowdale*, see *Am. White Book*, No. 4, Part XXII.

[5] The Chinese delegate to the Hague Peace Conference of 1907 complained that "from five to six hundred of our countrymen engaged in their peaceful occupations have there met a cruel death in consequence of these dangerous engines of war." Higgins, *The Hague Peace Conferences*, 329.

[6] Preamble. [7] Art. I. [8] Art. I.

CHAP. XXIX

Moreover, it was forbidden to lay anchored mines off the coast or ports of the enemy "with the sole object of intercepting commercial shipping."[1] Further provisions stipulated that when anchored mines are used "every possible precaution must be taken for the security of peaceful shipping,"[2] and that at the close of the war belligerents must do their utmost to remove the mines which they have laid.[3] The convention was frankly referred to at the conference as an unsatisfactory compromise, and as likely to be of little effect in view of the obvious loopholes in the law which conflicting views made it necessary to leave.[4] Since the convention contained no provision forbidding the laying of mines on the high seas, Great Britain, believing such practice to be illegal, signed with the reservation that the absence of a particular prohibition in the convention must not be held to debar the British Government from contesting the legitimacy of the act in question.[5] It should be observed that no reference was made in the convention to mines controlled by electrical apparatus on the shore, since these presented no dangers to peaceful shipping.

Practice during the World War

On account of the failure of Russia to sign the convention, the belligerents in the World War were thrown back upon the uncertain customary law. Great Britain early announced that in view of the alleged indiscriminate laying of mines by Germany she might have to adopt similar measures in self-defense. On October 2, 1914, these threatened measures made their appearance, taking the form of a system of mine-fields in the southern portion of the North Sea, which was later extended over the whole of the North Sea. Germany replied, February 4, 1915, by proclaiming the waters surrounding the United Kingdom a "war-zone" in which enemy merchant ships would be destroyed without warning.[6] A further extension by Great Britain of the North Sea area led to protests from the United States;[7] but upon the entrance of the latter into the war an even more elaborate "North Sea barrage" was established,

[1] Art. 2.

[2] Art. 3. In signing the convention France and Germany made reservation of this article.

[3] Art. 5.

[4] See, in particular, the statement of the British delegate, Sir Ernest Satow, to the effect that, having voted for the convention, the British delegation desired "to declare that it cannot regard this arrangement as furnishing a final solution of the question," adequate account not having been taken of the right of neutral navigation to protection. Higgins, *op. cit.*, 340 ff.

[5] *Ibid.*, 342.

[6] See Phillipson, *International Law and the Great War*, Chap. XX. *Am. White Book*, I, 52 ff.; IV, 21 ff.

[7] Under date of February 19, 1917. *Am. White Book*, IV, 48.

imposing severe restrictions upon neutral shipping. As a result of the measures taken by the several belligerents, numerous neutral and enemy merchant ships were destroyed.[1]

d. Methods of maritime warfare

The methods laid down by international law for the conduct of maritime warfare parallel in a general way those prescribed for war on land. As in the case of other rules of maritime warfare, they rest largely upon a basis of customary law. Several general conventions were, however, adopted at the Hague Conference of 1907 dealing with particular methods of maritime warfare, leaving other methods to be governed by existing rules. These conventions relate to the treatment of prisoners in naval warfare, the bombardment of coast towns, and the exercise of the right of capture in respect to enemy property of particular kinds. The rules prescribed reproduce on the whole the corresponding provisions of the Hague Convention respecting the Laws and Customs of War on Land.

Surprise attacks

By customary law it is forbidden, on sea as on land, to announce that no quarter will be given, to kill those who have laid down their arms, to refuse possible aid to those who are defenseless and at the mercy of the sea. The special circumstances of naval warfare appear, however, to justify the attack upon armed vessels by methods, such as the use of torpedoes and mines, which may make impossible the rescue of the crew of an armed vessel after it has ceased to offer resistance. Moreover, it is permissible to attack without warning unarmed public vessels, such as colliers, supply-ships, repair-ships, and the like. The unarmed, but combatant, officers and crew of such vessels need not be given an opportunity to surrender.

The use of deceit: false flags

The use of deceit is as permissible between the belligerent forces in naval warfare as in land warfare. Ruses of any kind not involving perfidy may be resorted to. Usage more or less general sanctions the employment of false flags, whether enemy or neutral, as a stratagem to lead the enemy into action or to escape from him; but customary law definitely requires that the national flag must be shown before actual attack. The vague rule of the Hague Regulations[2] forbidding a belligerent to make "improper use" of the national flag of the enemy left the customary law where it stood. The disguise of a merchant ship has been used by men-of-war to

[1] For a general review of the situation, see Garner, *op. cit.*, I, Chap. XIV.

[2] Art. 23f. Compare the more restricted use of false flags in warfare on land. Above, p. 467. For the question as to the use by a belligerent of a neutral flag as a means of deceiving the enemy, see *Am. White Book*, I, 55.

CHAP. XXIX

take the enemy by surprise. During the World War, for example, both British and German ships resorted to such practices, either by erecting false funnels or by masking their batteries behind camouflaged fronts. Attack in secret, whether under cover of darkness or by submersed submarine, is permissible. Signs of distress, as a means of luring the enemy into a position where he may be taken unawares, are, however, generally condemned, since they involve a degree of perfidy in their urgent appeal for help.[1]

Treatment of prisoners

The treatment of prisoners in naval warfare has presented no special difficulties and has been impliedly covered by the regulations governing the treatment of prisoners in war on land.[2] With respect to the treatment of the sick and wounded, however, the circumstances of maritime war differed sufficiently from those of land warfare to make it seem desirable at the Hague Conference of 1899 to draw up a separate Convention for the adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864.[3] This convention was revised by the conference of 1907, so as to bring it more into accord with the revised Geneva Convention of 1906 and with the recent developments of naval warfare.[4] The convention provided that military hospital ships, the names of which had been communicated to the belligerent powers, "shall be respected, and can not be captured while hostilities last."[5] The same provisions applied to hospital-ships equipped by private individuals or relief societies when holding an official commission from their government;[6] or in the case of ships fitted out by neutrals, when under the control of the belligerent and when authorized by their own and by the belligerent government.[7] All three classes of ships must afford relief to the sick and wounded of both belligerents alike, and none might be used by their governments for any military purpose.[8] Provision was made for distinguishing marks by which the ships should be known.[9] The inviolability of the hospital-ships themselves was extended in part to the sick wards of war-vessels, and to neutral ships which responded to an appeal to take on board the sick and wounded.[10] The religious,

[1] Vattel cites as a "detestable breach of good faith" the reported case of a British frigate which came within sight of the coast of France and made signals of distress in order to decoy a vessel to come to the rescue "and thereupon seized the boat and made prisoners of the sailors who generously went to its aid." *Droit des Gens* (Eng. trans.), Bk. III, § 178.

[2] See above, pp. 470 ff.

[3] For the text of the convention, see Malloy, *Treaties*, II, 2035.

[4] For the text of the convention, see *ibid.*, 2326; *Hague Conventions*, 163.

[5] Art. 1. [6] Art. 2. [7] Art. 2, 3.

[8] Art. 4. [9] Art. 5. [10] Art. 7, 9.

medical, and hospital staff of a captured ship, as distinct from combatant officers, were not made prisoners of war.[1] Further provisions related to the care of disabled prisoners, the right of a belligerent warship to demand that the sick, wounded, or shipwrecked prisoners on board hospital-ships be handed over to it,[2] the disposition of the sick and the wounded, their care in neutral ports, protection against pillage, and the burial and identification of the dead.

Practice during the World War

During the World War hospital-ships of the Allied Powers were in a number of cases attacked and sunk by German submarines. On the part of Germany it was urged, in a memorandum of January 28, 1917, that the vessels were in certain cases indistinguishable, and that they were being used not only for the purpose of giving aid to the sick and wounded but for military purposes as well. In view of alleged conclusive evidence of the latter charge, the German Government gave warning that thereafter all hospital-ships within a defined zone would be "considered as belligerents and would be attacked without further consideration." The charges were contested by the British Government, and warning was given of reprisals if the German threat was carried out; at the same time the use of distinctive marks of hospital-ships was discontinued. The attacks went on, and reprisals followed on both sides, but without effect upon the continued sinking of the ships.[3]

Bombardment of coast towns

The rules of both customary and conventional law with respect to bombardment by naval forces parallel, in a general way, the rules of war on land. Certain exceptional conditions of maritime warfare, however, led to the adoption by the Second Hague Conference of the Convention concerning Bombardment by Naval Forces in Time of War.[4] The convention distinguished between defended and undefended towns[5] and provided that, subject to certain exceptions, the latter might not be bombarded.[6] The vagueness of the term "undefended" left the scope of the prohibition

[1] Art. 10.

[2] Great Britain refused to agree to this provision, which had been urged by the United States delegate to prevent a repetition of the situation occurring in 1864 when a British vessel, the *Deerhound*, rescued, and gave the protection of a neutral flag to officers and sailors of the Confederate cruiser *Alabama* when defeated by the *Kearsarge*. See *Proceedings of the Hague Peace Conferences*, 1899, I, 391-392; 1907, III, 310.

[3] For a review of the controversy and of the facts alleged on both sides, see Garner, *op. cit.*, I, §§ 319-327.

[4] For the text of the convention, see Malloy, *Treaties*, II, 2314.

[5] Including ports, villages, dwellings, or buildings.

[6] Art. I.

indefinite. The same article further provided that a town must not be bombarded "solely because automatic submarine contact mines are anchored off the harbor"; but to this provision four of the Great Powers took exception. Further, it remained uncertain whether coast-defenses situated at some distance from a coast town constituted a "defense" which would subject the town to attack.[1] The general rule was still further weakened by permitting the belligerent to destroy military works, depots of arms, and plants for the manufacture of war material, and excusing him from responsibility "for any unavoidable damage which may be caused by a bombardment under such circumstances."[2] The bombardment of undefended towns was further permitted as a means of forcing compliance with a demand for requisitions, although not permitted to enforce payment of money contributions.[3] The belligerent was obligated, in carrying out a bombardment, to "spare as far as possible" buildings devoted to public worship, art, science, or charity, which buildings were to be indicated by prescribed visible signs.[4] A conditional obligation was laid down that "if the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities"; while an absolute prohibition was laid against the pillage of a town, even when taken by assault.[5]

The numerous loopholes of escape contained in the provisions of the convention left its obligations largely dependent in concrete cases upon the arbitrary judgment of naval commanders. Moreover, during the World War its provisions were not technically binding upon the belligerents. In consequence, there was little room for an appeal to the convention when a number of British coast towns were bombarded by German naval forces without warning. On its side, the German Government alleged that the presence in the towns of troops, barracks, or land batteries made them "defended" towns. Reprisals also figured in the German defense of the bombardment.[6]

[1] E.g., in the instance of the city of New York, the guns placed at Sandy Hook.

[2] Art. 2. [3] Art. 3, 4. [4] Art. 5. [5] Art. 6, 7.

[6] Garner observes with reference to the bombardment of Scarborough, Hartlepool, and Whitby: "If these bombardments are not forbidden by the Hague convention, it is a fair question to raise whether any bombardments are forbidden. We may not agree with the verdict of the coroner's jury at the inquest over the victims at Scarborough that they met their death as the result of a 'murderous attack,' but it is hard to avoid the conclusion that the act was contrary to the elementary rules of honorable warfare and in violation of the spirit if not the express terms of the Hague convention." *Op. cit.*, I, 432.

An important method of maritime warfare must be mentioned here, although the problems to which it has given rise bear principally upon the rights of neutral states and are more commonly and properly discussed in that connection.[1] The belligerent right to blockade enemy ports is, in so far as regards the enemy, as complete as the belligerent right to invest defended inland towns and reduce them to surrender by starvation. In the case of maritime warfare, however, blockade seeks to bring economic pressure to bear upon the enemy state as a whole, with resulting distress not merely to the non-combatants of the blockaded ports but to the entire civilian population. Such was the purpose of the blockade of the Confederate States by the United States from 1861 to 1865 and of the "blockade" of Germany by Great Britain from 1914 to 1918.[2] In maintaining such a blockade, however, belligerents are bound by certain limitations, prescribed primarily in the interest of neutral states, but indirectly to the benefit of the blockaded state. Should these rules be violated by one of the belligerents it would appear that the injured belligerent may institute a claim against neutrals for their failure to hold the belligerent to the observance of their rights. By inference from general principles it would appear that the injured belligerent may, as in the case of other violations of the law, resort to reprisals to coerce the offender to desist from his unlawful conduct.[3]

Blockade of enemy country

By an old rule of international law, firmly rooted in custom, a belligerent has the right to capture and confiscate the private property of enemy subjects when found upon the high seas and, with certain exceptions, when found in the territorial waters of either belligerent. This rule is in marked contrast with the exemptions from confiscation accorded in modern times to private property of enemy subjects on land. The survival of the right at sea long after the right in land warfare was abandoned is to be explained chiefly by the fact that the right to destroy the merchant marine and overseas commerce of the enemy has been a powerful weapon in the hands of states having formidable navies.[4] The persistent agitation of the United States for the abolition of the right to capture enemy private property on the seas was consistently opposed by

e. Capture of private property

[1] See below, pp. 537 ff.

[2] For the German complaint of the unlawfulness of the British blockade during the World War, see Garner, II, § 523. For the attitude of the United States as a neutral, see below, p. 542.

[3] Such was the position taken by Germany in 1915. *Ibid.*, I, § 230.

[4] See above, p. 299.

CHAP. XXIX

Great Britain, and was, as has been seen, the ground of the refusal of the United States to adhere to the Declaration of Paris [1] and also to sign the Convention relating to the Conversion of Merchant Ships into Warships, adopted at the Hague Conference of 1907.[2] At this conference the United States again introduced its proposal of the inviolability of private property at sea, but the proposal met with opposition from Great Britain, whose delegates were supported by those of France, Russia, and Japan and other smaller states; so that under the rules of the conference the proposition, although supported by a majority, could not be considered as adopted.[3]

Exception in favor of enemy vessels in port

The general rule permitting a belligerent to capture private property of the enemy upon the seas and in the territorial waters of the belligerents is subject to a number of exceptions originating as customary law and confirmed and extended by convention. The most important of these relates to the conditional immunity from capture of enemy merchant vessels, privately owned, which are found by a belligerent in its ports upon the outbreak of war. This exception, however, is not strictly a qualification of the rule of liability to capture at sea, but rather an extension to merchant vessels in port of the general exemption of enemy alien property within the territorial jurisdiction of the belligerent state. It is, therefore, more logically classified under that heading.[4] By an extension of the conditional exemption accorded to enemy merchant vessels in port, custom and convention sanction the immunity from capture of the same vessels while returning to their home ports,[5] as well as of enemy merchant vessels which left their last port of departure before the commencement of the war and are encountered at sea while ignorant of the outbreak of hostilities.[6] In the latter case, however, the enemy vessel is subject to detention or requisition.

By customary law fishing-vessels engaged in coast fisheries, as

[1] See above, p. 493. [2] See above, p. 495.

[3] The literature upon the subject of the proposed abolition of the capture of enemy private property upon the seas is voluminous. A summary of the position of the United States may be found in the address of Mr. Choate before the Fourth Commission of the Hague Peace Conference, June 28, 1907. *Proceedings*, III, 752 ff. For a brief bibliography see Hershey, *Elements of International Law*, 441, n. 56. An exposition of the political motives influencing the attitude of the different powers toward the question may be found in Hyde, *International Law*, II, §§ 771-772. The history of the subject is sketched in Quigley, *Immunity of Private Property from Capture at Sea*.

[4] See above, p. 450.

[5] The exemption is implied in Article 1 of the Convention relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities.

[6] Art. 3, *ibid.*

distinct from deep-sea fisheries, have been regarded as exempt from the rule of capture of enemy property at sea. The ground of this exemption was stated by the United States Supreme Court in the case of the *Paquete Habana*[1] as being "considerations of humanity to a poor and industrious order of men" and "the mutual convenience of belligerent states." The court reached the conclusion in the above case that "by the general consent of the civilized nations of the world,[2] and independently of any express treaty or other public act," it was an established rule of international law "that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war."[3]

Exemption of fishing-vessels

At the Second Hague Conference the Convention (XI) relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War was adopted, which confirmed the customary rule of exempting from capture coastal fishing-vessels, and included with them "small boats employed in local trade."[4] The scope of the latter exemption was not definite, but it would appear that large coasting-steamers are excluded. In both instances the exemption was made conditional upon the vessels not taking "any part whatever in hostilities." Further, the convention provided that "vessels charged with religious, scientific, or philanthropic missions are likewise exempt from capture,"[5] thus confirming another customary rule.

A new rule of law was introduced by the Eleventh Convention in the provision that the postal correspondence of belligerents, "whatever its official or private character may be," with the exception of correspondence destined for or proceeding from a blockaded port, is inviolable.[6] When the ships are detained the

Postal correspondence of belligerents

[1] 175 U. S., 677 (1900). Scott, *Cases*, 12; Evans, 602.

[2] It would appear that the recognition by Great Britain of the rule was as one "of courtesy only, and not of legal decision." See the case of the *Young Jacob and Johanna*, 1 C. Rob., 20 (1798). A minority of the court in the *Paquete Habana* case dissented on the ground that a rule to which Great Britain had not assented could not be regarded as a general custom.

[3] In reaching its conclusion the court referred to the historical practice of maritime states, to treaties, judicial decisions, and the evidence presented by jurists and commentators upon international law. See above, p. 68. The case also contains a statement of the relation of international law to municipal law. See above, p. 79.

[4] Art. 3. Malloy, *Treaties*, II, 2348.

[5] Art. 4.

[6] Art. 1. The rule extends as well to postal correspondence of the enemy found in neutral ships, a matter belonging more properly to the law of neutrality. See below, pp. 532 ff.

CHAP. XXIX

correspondence must be forwarded by the captor with the least possible delay. The exemption of postal correspondence does not, however, extend to enemy mail ships themselves, a limitation apparently due to the fact that such vessels are of too great potential value to the enemy, owing to the possibility of their conversion into auxiliary ships of war.[1] In addition to the above exemptions, there are the special cases of cartel ships, engaged in the transportation of exchanged prisoners of war, as well as hospital-ships engaged in the relief of the sick and wounded.[2]

Enemy goods found on neutral vessels

In accordance with a rule of international law which found recognition in the Consolato del Mare of the fifteenth century, the ownership of the property determined its liability to capture. Consequently, the goods of an enemy might be seized, even if found in a neutral vessel, and irrespective of the vessel's destination. This rule was contested by Holland in the seventeenth century, and the principle was advanced that "free ships make free goods"; that is to say, a neutral ship not subject to capture gives immunity by its flag to all goods found within it. The new principle, supported by Sweden and Russia in 1780,[3] fought its way against the old rule enforced chiefly by Great Britain and the United States,[4] until it was finally adopted as contractual law by the states parties to the Declaration of Paris of 1856. The declaration provided that "the neutral flag covers enemy's goods, with the exception of contraband of war." The exemption thus granted was, indeed, rather a concession to the claims of neutral ships than a limitation of the general right to capture enemy property, and the subject, therefore, belongs more properly to the law of neutrality,[5] although convenience warrants its consideration at this point. In 1898 the United States, although not a party to the Declaration of Paris, referred to the above rule, with others, as "recognized rules of international law."[6]

The test of enemy character: vessels

Owing to the liability of enemy property to capture at sea, the problem has long been presented to prize-courts, when passing upon the legality of captures, to determine what properly consti-

[1] During the World War the Eleventh Convention was not technically binding upon the belligerents owing to the failure of Russia to sign it. Consequently only such of its provisions as were previously part of customary law were binding.

[2] See above, p. 502.

[3] See below, p. 533.

[4] For the conflicting attitudes of the judicial and the executive branches of the American Government, see Moore, *Digest*, VII, § 1195; Hyde, *International Law*, II, § 762. See also the case of the *Nereide*, 9 Cranch, 388 (1815), below, p. 533.

[5] See below, p. 532.

[6] Moore, *Digest*, VII, 452.

tutes enemy property.[1] The accepted general principle, that the property of enemy subjects is enemy property, has been qualified by a number of special rules enforced by some of the leading powers, although repudiated by others. With respect to the national character of a vessel as distinct from its cargo, the customary rule of international law has been that such character, whether enemy or neutral, is determined by the flag the vessel is authorized to fly. In the case of the *Pedro*[2] the Supreme Court of the United States held that the fact that British citizens were owners of the stock of the company controlling the vessel could not offset the further facts that the company was incorporated under the laws of Spain and the vessel flew the Spanish flag, making her liable to capture. The rule of custom found confirmation in the Declaration of London, although adopted "subject to the provisions [of the same declaration] respecting transfer of flag."[3] It follows from this rule that the enemy ownership of a vessel does not subject it to capture provided it has been duly registered and carries the papers of a neutral state; nor does neutral ownership protect a vessel flying an enemy flag.

National character of cargoes

Greater difficulty arises in determining the national character of the cargo carried by a ship. Omitting the case of enemy cargoes on neutral ships, where the protection afforded by the neutral flag to its entire cargo disposes of any question of the ownership of the latter, there remains the question of cargoes carried by enemy ships. Since neutral cargoes are exempt from capture upon enemy ships,[4] it remains only to pass upon the question of enemy ownership. Two conflicting rules are enforced by separate groups of states. Great Britain and the United States, recently supported in part by Japan, have long followed the rule which makes the domicile of the owner the test of enemy or neutral character, so that goods owned by a neutral, or even by a citizen of the belligerent captor, resident and doing business in the enemy state, take on enemy character and are liable to capture.[5] In the application of this rule British and American courts have held not merely that the domicile of the owner in an enemy country will subject his goods to capture, but that a person domiciled in a neutral country

[1] For the question of what constitutes enemy property on land, see above, p. 448.

[2] 175 U. S., 354 (1899). [3] Art. 57. [4] See below, p. 532.

[5] During the World War Great Britain ceased to observe the converse of this rule and undertook to place on a "black-list" the names of enemy persons or companies doing business in neutral countries. See above, p. 456.

may, by having a house of trade in an enemy country, acquire thereby a "commercial" or "trade domicile" which will impart enemy character to his goods. In the case of Murray *v.* The Charming Betsy [1] the Supreme Court of the United States recognized, in respect to the application of the Non-Intercourse Act of 1800, that an American citizen by birth might, by long residence abroad, change his domicile, so that his property taken at sea would not have the national character belonging to its owner by birth.[2] In the case of the *Harmony* [3] the British High Court of Admiralty, in applying the rule of domicile as establishing the enemy character of goods, laid stress upon the fact that in determining domicile "time is the great agent in this matter; it is to be taken in a compound ratio, of the time and the occupation, with a great preponderance upon the article of time: be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicile." [4] In the leading case of the *Venus,* [5] decided in 1814, the doctrine of domicile was so rigidly applied by the Supreme Court of the United States as to condemn the property of a citizen of the United States, who had established his business and residence in Great Britain, and who had shipped the goods in question to the United States before knowing that war had broken out between the two countries.[6]

Doctrine of continental states

On the other hand, France, Germany, Italy, Russia, and other continental states hold that the test of the enemy character of goods is the nationality of the owner irrespective of his domicile. In the French case of *Le Hardy v. La Voltigeante,*[7] decided in 1801, the court held that the property of a citizen of Ragusa, resident and doing business at Messina during the war between France and the Two Sicilies, was neutral property and not subject to cap-

[1] 2 Cranch, 64 (1804).

[2] The case comes properly under constitutional law, but there is incidental discussion of the rules of international law.

[3] 2 C. Rob., 322 (1800). Cobbett, *Cases,* II, 180.

[4] See also the case of the *Indian Chief,* 3 C. Rob., 12 (1801), Scott, *Cases,* 659, in which an American merchant residing in England was not treated as an English trader, in respect to the application of the law against trading with the enemy, on the ground that as soon as he started for the United States his national character revived. "The character that is gained by residence," said the court, "ceases by residence; it is an adventitious character which no longer adheres to him, from the moment that he puts himself in motion, bona fide to quit the country, sine animo revertendi."

[5] 8 Cranch, 253 (1814). Scott, *Cases,* 672.

[6] A dissenting minority held that the owners should have been given time, after learning of the declaration of war, to resume the domicile of their allegiance.

[7] Pistoye et Duverdy, 321. Scott, *Cases,* 686.

ture. At the London Naval Conference an effort was made to reconcile the two conflicting rules, but without result. In consequence, the declaration merely provided that "the neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner,"[1] thus leaving it unsettled whether nationality or commercial domicile should determine the latter point.[2] The declaration further threw the burden of proof upon the owner to show that the goods were neutral and not enemy, and provided that the enemy character of goods on board an enemy vessel continues until they reach their destination and cannot be changed by a transfer of ownership en route.[3] In the leading case of the *Sally*[4] the court held that the goods of an American citizen, captured in transit to the enemy country, France, being "under a contract to become the property of the enemy immediately on arrival," were to be considered as enemy's property.

f. Visit and search of vessels

As an incident to the right of a belligerent to capture enemy private property upon the seas, the traditional procedure of maritime states was, until the opening of the World War, first to subject the vessels to "visit and search" with the object of determining the national character of the vessel itself and of its cargo. This procedure extended by right to neutral vessels as well, since the belligerent could not otherwise determine the true character of the vessel and of its cargo.[5] It was customary to give notice of intention to carry out the visit by signaling the vessel to stop by firing a blank charge or by firing a shot across its bows. The visit was, however, necessary only as a means of ascertaining the true character of the vessel and its cargo; so that, if this were otherwise known, the right of capture applied immediately.

g. Conditions justifying the attack and destruction of merchant vessels

On the part of the merchant ship itself the right to resist capture, whether by taking to flight or by the use of whatever forcible measures were at its command, was, as has been seen, clearly recognized, although the consequences of its exercise might be disastrous to non-combatant passengers on board. Only, however, in the event

[1] Art. 58.

[2] In the report accompanying the declaration the following comment was made: "It can not be concealed that article 58 solves no more than a part of the problem, and that the easier part; it is the neutral or enemy character of the owner which determines the character of the goods, but what is to determine the neutral or enemy character of the owner?" Charles, *Treaties*, 315.

[3] Art. 59, 60.

[4] 3 C. Rob., 300, note. Scott, *Cases*, 811; Evans, 539.

[5] See below, p. 550.

of actual resistance or danger of resistance on the part of armed vessels might the belligerent cruiser open fire upon the merchant ship or otherwise seek its destruction. In the absence of such resistance the belligerent cruiser was under obligation to effect the capture of the vessel in such manner as to insure the safety of the passengers and crew, whether by placing upon the vessel a prize-crew and sending it into port or by transferring the passengers and crew to another vessel. Prior to the World War, resistance on the part of merchant ships to capture, common in the days of privateers, had practically ceased, in consequence of the marked inequality between the armament of a warship and that capable of being carried by a merchant ship. In an emergency, such as the danger of recapture or the inability of the captor to spare a prize-crew, the captured vessel might, after the removal of passengers and crew, be destroyed. In such case no question could arise between the two belligerents as to the legality of the act of destruction. The circumstances justifying the destruction of captured enemy vessels, subject to the condition of removing the passengers and crew to a place of safety, were determined by the municipal law of the individual state.[1]

Questions presented during the World War: submarine warfare

Shortly after the outbreak of the World War new conditions were presented which raised the question of the applicability of the existing rules of customary law. The submarine made its appearance on the seas as a man-of-war, lightly armed both for defense and for offense, and relying for its effectiveness upon its ability to approach unseen and launch its torpedoes against an unsuspecting enemy. Such methods of combat were entirely consistent with the law of war in regard to armed or unarmed public ships of the enemy. These might be sunk without warning and without consideration for the fate of the combatant officers and crew.[2] The question arose whether the submarine might claim any modification of the law of war in regard to the capture of

[1] In the case of Great Britain and the United States the practice was followed that the title to property seized as prize changed only as the result of the decision of the national prize-court, so that while destruction was permissible in an emergency, and when there was no doubt that the vessel was good prize, it was obligatory upon the commander of the belligerent cruiser to send in to the prize-court such papers and other evidence of the character of vessel and its cargo as would permit a decree to be duly entered. See *U. S. Naval Instructions*, June 30, 1917. It should be observed that the elaborate rules of the Declaration of London with respect to the destruction of neutral prizes have no application to enemy prizes.

[2] See above, p. 496.

merchant ships. In the case of armed merchant ships the situation was presented in which the submarine, by reason of its light armament, was put at a disadvantage the moment it appeared upon the surface of the sea with its summons to the vessel to surrender. Must the submarine forego the advantages of its ability to operate underseas, and abandon the attempt to capture merchant ships carrying armament heavier than its own?

In the case of unarmed ships, several distinct situations were presented. Fast merchant ships had been built capable of eluding pursuit, and even of keeping out of range of a summons to submit to visit and search. Must the submarine sacrifice a strategic position for the launching of a torpedo out of the necessity of giving warning to such vessels, when that warning was, as experience had shown, not likely to be heeded? Again, the submarine, being of small size, could not carry a crew of sufficient numbers to spare a prize crew to be put upon the merchant ship; nor was its deck-space large enough to take on board the passengers and crew of captured vessels. Moreover, modern means of communication by wireless telegraph made it imperative that action with respect to the merchant ship be taken promptly, lest enemy warships come to the aid of the merchant ship before it could be disposed of. Was the submarine to be denied the right to introduce new methods of warfare without which its power of conducting offensive operations would be greatly diminished?

Uncertainty of the law

To these and other abstract legal propositions the existing rules of international law gave no definite answer. In consequence each belligerent sought to apply certain accepted general principles of the law to the concrete situations as they arose, and took its stand upon the inferences which it believed to be conclusive. The United States, as a neutral, intervened because of its interest in the welfare of its citizens who were passengers on merchant ships of the Allies, and because of its obligations of neutrality in respect to the admission of armed merchant ships into its ports.[1] A decision upon the legal merits of the several issues raised was rendered even more difficult, if not wholly impossible, by reason of the introduction into the controversy of the question of reprisals. In a number of cases the German Government, after presenting its legal argument based upon inferences from existing law, offered further justification of its position on the ground that the rules

[1] See below, pp. 528, 559.

CHAP. XXIX

of contraband and blockade applied by Great Britain were in contravention of existing law.[1]

h. Status of armed merchant ships

The fundamental difficulty arose in connection with the status of armed merchant ships.[2] Germany argued that they might be attacked without warning, on the ground that their armament, being equal or superior to that of the submarine when upon the surface, practically put them in the class of ships of war, against which it was lawful for the submarine to direct its attack unseen. Moreover, the alleged defensive armament of a merchant ship might immediately be used as offensive armament when the submarine appeared upon the surface of the sea to give the necessary summons to surrender. This argument was strengthened by the fact that instructions were alleged to have been issued by the British Admiralty ordering the officers of merchant ships to attack submarines at sight.[3] As against this position it was argued on the side of Great Britain that the existing law recognized the right of a merchant ship to defend itself if it chose to take the risk, and that the law did not excuse the belligerent cruiser from the obligation to give due warning simply because doing so would weaken its strategic position.[4]

Position taken by the United States

On January 18, 1916, the American Department of State, acting in the interest of neutral rights and obligations, proposed that the belligerents agree that merchant ships should thereafter "be prohibited and prevented from carrying any armament whatsoever," on condition that submarines should be made to adhere strictly to the rules of international law in respect to visit and search, the determination of belligerent nationality, and the removal of passengers and crew to a place of safety. The argument in support of the proposal was based upon the fact that the customary right of a merchant ship to go armed was "predicated on the superior defensive strength of ships of war" and the relatively inferior armament of piratical ships and privateers. The use of the submarine had, however, changed these relations, and, moreover, pirates had been driven from the seas and privateering abolished. Hence the arming of a merchant ship under present conditions could be explained only on the ground of a purpose

[1] See German memorandum of February 4, 1915. *Am. White Book*, I, 53. Also, memorandum accompanying communication of Jan. 31, 1917. *Ibid.*, IV, 403.

[2] For the rights of such ships as lawful combatants, see above, p. 495.

[3] See memorandum of German Foreign Office, February 8, 1916. *Am. White Book*, III, 167 ff. The allegation appears to have been correct.

[4] See *ibid.*, III, 187. Also, Garner, *op. cit.*, I, § 252.

to make the ship superior in force to submarines and to prevent warning and visit and search by them. "Any armament," the department concluded, "on a merchant ship would seem to have the character of an offensive armament."[1] The proposal being unacceptable, the department reverted to the old rule, and in a memorandum of March 25, 1916, took the stand that the mere presence of armament on board a merchant ship was not sufficient ground for a belligerent to consider it a warship and attack it without regard to the rights of persons on board. The status of an armed vessel on the high seas must, it was argued, "be determined only upon conclusive evidence of aggressive purpose, in the absence of which it is to be presumed that the vessel has a private and peaceable character, and it should be so treated by an enemy warship."[2]

i. Status of unarmed merchant ships

The status of unarmed merchant ships, while presenting less difficulty in respect to general principles, gave rise to a number of controversial issues on points of fact. On the side of Germany it was argued that swift merchant ships carrying cargoes of food and ammunition to the enemy were under the circumstances in reality engaged in hostile service. Moreover, the fact that the vessels themselves, although unarmed at the time, were readily convertible into auxiliary ships of war, and the further fact that by their construction they were capable of preventing the appli-tion to them of the rule of a summons to surrender, took them out of the class of merchant ships to which the existing laws of war applied.[3] As against this position it was claimed that reasons of military necessity on the part of Germany could not set aside the traditional right of passengers and crew not to be put in danger of their lives by the destruction of the vessel before they had been put in a place of safety.[4]

Case of the *Lusitania*

The sinking of the *Lusitania* by a submarine on May 7, 1915, presented the concrete issue in acute form. In a series of notes addressed to the American secretary of state, the German Government argued that the *Lusitania* was not an "ordinary unarmed merchant vessel" but was in the class of an auxiliary cruiser and

[1] *Am. White Book*, III, 162 ff.

[2] *Ibid.*, III, 183 ff. Hyde criticizes the March memorandum as a statement of international law, holding that the January proposal was correct in principle, being an attempt to extend an old rule to new conditions. *International Law*, II, § 743. Garner defends the March note, *op. cit.*, I, § 249, and is criticised by Borchard, *The Nation*, July 20, 1921.

[3] See Garner, *op. cit.*, I, § § 230, 240.

[4] See below, p. 516.

CHAP. XXIX

was included in the navy-list published by the British Admiralty. Moreover, there was reason to believe that the vessel was armed and that it had on previous trips carried Canadian troops and large quantities of ammunition. Further, the general practice of the British Government in arming its merchant ships, and in instructing them to use neutral flags and to attack the enemy, made it impossible to consider them any longer as "undefended territory" in the zone of maritime war. In addition, the unlawful blockade of Germany and the unwarranted extension of the rules of contraband made it necessary to resort to reprisals.[1] As against these arguments the American Government, speaking on behalf of its neutral citizens, waved aside technical arguments and insisted that it was "contending for nothing less high and sacred than the rights of humanity," and that only the "actual resistance [of the *Lusitania*] to capture or refusal to stop when ordered to do so for the purpose of visit could have afforded the commander of the submarine any justification for so much as putting the lives of those on board the ship in jeopardy."[2] The result of the several exchanges of notes was that Germany agreed, on May 4, 1916, not to sink merchant vessels "without warning and without saving human lives, unless those ships attempt to escape or offer resistance."[3] This agreement was, however, set aside on January 31, 1917, when the German Government announced that the "brutal methods of war" of the Entente Allies and their determination to destroy the Central Powers gave Germany "the freedom of action" which she denied herself in her note of May 4, 1916. Henceforth, all vessels met within the prescribed zone would be sunk.[4]

Rights of passengers and crew

Owing to the inability of the submarine to conduct its enemy prizes to its home ports, due partly to the small number of its crew and partly to the danger of recapture, and owing to its further inability to transfer the passengers and crew of the captured vessel to its own decks, the new practice was introduced of compelling the passengers and crew to take to the life-boats. In a note of November 29, 1915, the German Government accepted the position that all possible care must be taken for the security of the crew and passengers of a vessel to be sunk. "Consequently," it was agreed, "the persons found on board of a vessel may not be ordered into her life-boats except when the general conditions, that is to say, the weather, the condition of the sea, and the

[1] *Am. White Book*, II, 169, 175.
[2] *Ibid.*, II, 171, 178. [3] *Ibid.*, III, 302 ff. [4] *Ibid.*, IV, 405.

neighborhood of the coasts, afford absolute certainty that the boats will reach the nearest port."[1] The promise was, however, made with reference to neutral prizes. In the case of enemy prizes the obligation of protecting human life, while recognized in principle, was, in the view of the German Government, not always possible of strict fulfilment, even in the case of unarmed vessels, since their calls for help made it necessary at times for the submarine to take prompt action. In the case of the British vessel *Falaba,* sunk on March 28, 1915, with a loss of 104 persons, it was alleged by Germany that "the captain disregarded the order to lay to and took to flight, sending up rocket signals for help." The torpedo was not fired "until suspicious steamers were hurrying to the aid of the *Falaba.*"[2] In the case of the *Ancona,* sunk on November 7, 1915, the Austro-Hungarian Government claimed that the loss of life was due to the failure of the vessel to heed the warning to stop, and to other circumstances not the fault of the submarine.[3] In these as in other cases the principle of law thus remained in the background, and it became a question of fact, not readily determinable under the circumstances, whether the individual commander had fulfilled the obligation incumbent upon him or had been guilty of wilful and inhuman conduct. So conditioned, the responsibility of the belligerent state became elusive.[4]

j. Outlawry of submarines as commerce-destroyers

In view of the suffering and loss of life on the part of non-combatants and of the unwarranted damage to neutral shipping caused by the methods of warfare pursued by the German submarines, the Washington Conference on the Limitation of Armaments in 1921-22 undertook to lay down specific rules governing the use of the submarine in the future. The British delegation proposed that since the use of the submarine, while of small value for defensive purposes, inevitably led to violations of the laws of war, "united action should be taken by all nations to forbid their maintenance, construction or employment." To this extreme posi-

[1] *Am. White Book,* III, 316.

[2] *Ibid.,* II, 169 ff.

[3] *Ibid.,* IV, 178 ff. In its note of protest the United States had asserted that "the conduct of the commander can only be characterized as wanton slaughter of defenseless non-combatants, since at the time when the vessel was shelled and torpedoed she was not, it appears, resisting or attempting to escape." *Ibid.,* 175.

[4] The student should draw, here as elsewhere, a distinction between the principles which belligerents announce as guiding their conduct and the actual conduct observed by them. The principles represent the rule of law as the state interprets it, whether or not obeyed in the particular emergency. The chief object of the text is to present the principles recognized.

tion the United States delegation was opposed, and offered as an alternative that laws should be drawn up prescribing the methods of procedure to be followed by submarines against merchant vessels both belligerent and neutral. The decision taken by the conference was incorporated in a treaty signed on February 6, 1922.[1] The treaty applies to the submarine the existing rules, "deemed to be an established part of international law," as regards the visit and search of merchant vessels, and requires that if a submarine cannot conform to them it must desist from attack and permit the merchant vessel to proceed unmolested.[2] Other states are called upon to assent to the same statement of established law.[3] Further, the contracting powers, recognizing the practical impossibility of using submarines as commerce-destroyers without violating the laws of war, prohibited as between themselves the use of submarines for that purpose and called upon other powers to adhere to the prohibition.[4]

[1] For the text of the treaty, see *Am. Journal,* XVI (1922), Supp., 57.

[2] Art. I. In ratifying the treaty France entered a reservation to the effect that its provisions were not to apply to an *armed* merchantman.

[3] Art. II.

[4] Art. IV. Art. III undertakes to make any person in the service of any power who violates the rules laid down, whether or not acting under the orders of a governmental superior, liable to trial and punishment "as if for an act of piracy." See below, p. 579. For comment on the treaty, see "Conference on the Limitation of Armament: Report of the American Delegation," *Am. Journal,* XVII (1922), 159, 185.

CHAPTER XXX

THE RELATION OF NEUTRAL STATES TO BELLIGERENTS

a. General principles of neutrality: neutral rights

The procedure of war is, as has been seen, a legally recognized means of coercion for the maintenance of rights or the redress of wrongs. In the absence of a recognition of collective responsibility on the part of the community of nations, and of an organization to give effect to it, each state may determine for itself the conditions under which resort to such procedure is expedient, as well as legal, and its action in so doing is restricted only by the general sanctions of international law against arbitrary conduct.[1] Resort to the procedure of war, however, necessarily brings the parties to the conflict, plaintiff and defendant states alike, into new relations with third states. On the one hand, international law recognizes the *right* of third states to remain aloof from the conflict. While it is their option to take sides with one or other of the belligerents if they find it to their essential interest to do so, it is also their right to declare that the war is one in which they have no legal concern.[2] In taking this latter position third states acquire the inferential right to have their position of neutrality respected by the belligerents, together with a number of subordinate rights necessary to the enjoyment of their primary right. These rights of neutral states obviously give rise to corresponding duties on the part of belligerents to observe them.

Belligerent rights

On the other hand, international law recognizes the right of the belligerent state to hold third states to the observance of certain duties corresponding to the position of neutrality they have assumed. The claim of the neutral state to have its neutrality respected must be accompanied, not only by a negative attitude of non-interference, but by positive measures to prevent the commission within its territory of acts which have come to be regarded

[1] See above, p. 381.

[2] This attitude is formally taken by the publication of a "proclamation of neutrality," setting forth the fact that certain states are at war, and that the neutral state is on terms of friendship with them and proposes to remain so. American proclamations include a summary of the obligations incumbent upon the citizen body in pursuance of the laws enacted for the maintenance of neutrality. For a sample proclamation, see *Am. Journal*, IX (1915), Supp., 110.

CHAP. XXX

as in contravention of neutrality. *Belligerent right* and *neutral duty* are here correlative; but in consequence of the greater convenience to governments of discussing neutral conduct in terms of positive acts, international practice has defined the scope of belligerent rights of this character in terms of neutral duties.[1]

In addition to the belligerent right to hold the neutral to its position of neutrality, international law has recognized that a belligerent cannot carry on war effectively without interfering in some degree with the normal intercourse between neutral citizens and the enemy state. It therefore calls upon neutral states to acquiesce in the imposition upon their citizens of certain restrictions in their commercial and social relations with the enemy state which are incidental to the successful prosecution of hostilities by the belligerent. These restrictions are principally the result of the application of the belligerent right to blockade enemy ports and to prevent the carriage to the enemy of contraband goods.[2]

b. Conflict between belligerent and neutral rights

The conflict between belligerents and neutrals as to their respective rights and duties fills a large place in the history of international relations of the past two centuries. Belligerents, on their part, have been reluctant to observe the rights of neutral states. Until the seventeenth century, when the conception of sovereignty began to take more definite shape, acts of war were freely committed within the territory of weaker neutral states; and even when the theory of neutral rights came to be generally accepted the practice of belligerents failed to conform to it. Ships were attacked in neutral territorial waters,[3] belligerent troops were marched through neutral territory, and defeated enemy troops were pursued into it.[4]

At the same time, neutral states on their part had but an inadequate conception of the obligations now regarded as legally consequent upon the status of neutrality. Grotius devoted but a brief chapter to the status of those whom he described by the expressions, *qui in bello medii sunt; qui extra bellum sunt positi.* It seemed consistent to him that a state might remain neutral, and yet pass upon the justice of the war in progress and modify its neutral conduct accordingly.[5] During this period the duties of a

[1] See below, Chap. XXXIII. [2] See below, Chap. XXXII.
[3] For instances, see Hall, *International Law*, § 209.
[4] Compare Vattel's vague rules, Bk. III, § § 119-135.
[5] "It is the duty of neutrals," he said, "to do nothing to strengthen those who are prosecuting an unjust cause, or which may impede the movements of him who is carrying on a just war. . . . But if the cause is a doubtful one they must manifest an impartial attitude towards both sides, in permitting them to

neutral state were for the most part determined, not by fixed international custom, but by treaties between individual states, by which each state sought to prevent third parties from giving help to the enemy in the event of a possible war.[1]

Increasing regard for neutral rights

By the middle of the eighteenth century the increasing recognition of the principle of territorial sovereignty resulted in fewer instances of the commission of hostilities by belligerents in neutral territory, and publicists were explicit in affirming a rule of law upon the subject.[2] On the other hand, the conception of neutral duty was still defective. Bynkershoek, writing in 1737, thought that "the purchase of soldiers among a friendly people is as lawful as the purchase of munitions of war";[3] while Vattel, writing in 1758, thought that a sovereign might give to a belligerent "the moderate assistance which he owes in virtue of a former defensive alliance" without thereby becoming a party to the war. Moreover, levies of troops might be permitted and loans of money made in favor of one belligerent as against the other where the neutral nation believed that it had good reasons for the discrimination.[4] Apart from these exceptions, Vattel formulated clearly the two fundamental principles of neutral duty, (1) that in all matters connected with the war a neutral state must abstain from helping either party, and (2) that in matters not connected with the war a neutral state must not refuse to one of the belligerents what it grants to the other.[5]

c. Present state of the law

From the time of Vattel down to the present day the inviolability of neutral territory has been clearly recognized in principle, though occasionally violated in practice. On the side of neutral duty there has been a gradual strengthening of the obligation of the neutral state, not only to refrain in its corporate capacity from rendering assistance to either party, but to take active measures to restrain its citizens and those within its jurisdiction from performing acts which would compromise its neutrality. In this latter respect the Neutrality Act passed by the United States in 1794 is conspicuous for its clear formulation of neutral obligations.[6] As against this consistent development of the law there has been a constant struggle between belligerents and neutrals with respect

pass through the country, in supplying their troops with provisions, and in not relieving the besieged." Bk. III, Chap. XVII, 3.

[1] For a list of such treaties, see Hall, *op. cit.*, § 208.

[2] See Vattel, III, § 132.

[3] *Quæstiones Juris Publicæ*, Lib. I, Cap. 22.

[4] Bk. III, § § 104-105.

[5] *Ibid.*

[6] See below, p. 561.

CHAP. XXX

to the legality of the interference by belligerents with neutral commerce. Belligerents with powerful navies have endeavored to extend the scope of the rules of blockade and contraband in order to bring the sharpest possible economic pressure to bear upon the enemy. On the other hand, the growth of commercial relations has made neutrals more than ever reluctant to submit to the restraints imposed upon their commerce by a war in which they have no immediate concern.[1]

d. Neutrality under the Covenant of the League of Nations

It remains to be seen how far the establishment of the League of Nations will modify the fundamental principles of the law of neutrality. A number of the provisions of the Covenant, taken in their literal bearing, run counter to the primary conception of neutrality. The principle of the collective responsibility of the League as a whole for the maintenance of international peace negatives the traditional right of a sovereign state to use its individual judgment with respect to the issues of the war and to stand apart from the conflict if it should find it to its interest to do so.[2] Article 11 of the Covenant states that "any war or threat of war, whether immediately affecting any of the high contracting parties or not, is hereby declared to be a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations." While the obligation of collective intervention here assumed is not absolute, it gives to such intervention a legal character, and it makes the neutrality of the individual state dependent in principle, if not in fact, upon the decision of the League rather than upon its own personal judgment.

More explicit abandonment of the right of individual neutrality is seen in the case, provided for in Article 16, in which a member of the League resorts to war in violation of the agreement to arbitrate contained in Article 12 of the Covenant. Such a state shall thereby "ipso facto be deemed to have committed an act of war against all other members of the League," and the latter shall forthwith discontinue trade and financial relations with the offending state. Again, the obligation assumed by Article 10, "to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League" is incompatible with neutrality in the event of wars re-

[1] For general comment, see M. W. Graham, Jr., "Neutrality and the World War," *Am. Journal*, XVII (1923), 704.

[2] See above, p. 48.

garded as coming within the terms of the agreement. In view, however, of the uncertain practical effectiveness of the League of Nations, because of the individual veto power of its members, and in view of the technical loopholes of escape left between its several articles, legal as well as illegal resort to war is still possible. In consequence, neutrality may be still a legal attitude both for members of the League and for states not members of the League but governed by the old customary law.

CHAPTER XXXI

NEUTRAL RIGHTS

a. Inviolability of neutral territory

By direct inference from the right of a state to remain neutral in a given war is the right to maintain the integrity of its territory as against the commission therein of acts of hostility by either of the belligerents. This right, as has been seen, is implicit in the conception of sovereignty. Both the Hague Conventions confirm the customary law in this respect. The Convention (V) concerning the Rights and Duties of Neutral Powers and Persons in War on Land declares that "the territory of neutral Powers is inviolable";[1] while the Convention (XIII) respecting the Rights and Duties of Neutral Powers in Naval War lays down the same rule in terms of the duty of the belligerent "to respect the sovereign rights of neutral Powers" and to abstain "from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality."[2] In both conventions the right of the neutral to resist by force attempts to violate its neutrality is specifically declared not to constitute a hostile act.[3]

Where violations of neutral territory have been perpetrated by belligerent commanders, reparation by way of apology and redress is due from the belligerent state. In the case of the Confederate cruiser *Florida*, which in 1864 was captured in Brazilian waters by the United States man-of-war *Wachusett*, the United States admitted that the capture was "an unauthorized, unlawful, and indefensible exercise of the naval force of the United States, within a foreign country, in defiance of its established and duly recognized government."[4] Due apology was made, the commander of the *Wachusett* was sent before a court martial, and the crew of the *Florida* were set at liberty. As the vessel itself had foundered in Hampton Roads, it could not be restored, but no obligation to make substitution or pecuniary compensation was recognized. In the case of the *Chesapeake*, a passenger steamer which had been captured in 1865 by certain persons acting in the interest of the

[1] Art. 1.
[2] Art. 1.
[3] Convention V, Art. 10; Convention XIII, Art. 26.
[4] Moore, *Digest*, VII, 1090 ff.

Confederate States, and was subsequently seized in British territorial waters by a United States cruiser, the United States disclaimed "any exercise whatever of authority, by its agents, within the waters or on the soil of Nova Scotia."[1]

Violations of neutral territory in self-defense

Under what circumstances the right of self-defense might justify a belligerent in committing an act of hostility within neutral territory is a political rather than a legal question.[2] During the Russo-Japanese War, Manchuria and Korea became the actual theater of war, although both were technically neutral territory. Japan's justification was that neither China nor Korea was able to protect herself from the control by Russia which it was the very object of Japan in the war to break.[3] More doubtful was the justification offered by Japan for the violation of Chinese neutrality during the attack upon Kiau-chau in 1914.[4] Whether, under other conditions, such as the massing of large numbers of French troops upon the western boundary of Belgium in 1914, Germany would have been justified in anticipating an attack from that quarter, is a question outside the range of international law.

An exceptional case in maritime warfare is to be seen in the demand made by the British Government upon Denmark in 1807 for the surrender of the neutral Danish fleet to Great Britain to prevent it from being used by Napoleon against Great Britain. Upon the failure of Denmark to comply with the request, orders were given to seize the fleet.[5] Less grave instances of the violation of neutral territorial waters in self-defense are those in which belligerent commanders have acted upon their own responsibility and have subsequently been supported by their governments. In 1814 the American privateer *General Armstrong* defended itself in Portuguese territorial waters against the attack of a British vessel, and the United States not only considered the act justifiable but pressed a claim against Portugal for damages for failure to give protection.[6]

[1] *Ibid.*, II, § 210, where further cases in illustration may be found.

[2] The case of the *Caroline* has already been cited in illustration of an emergency arising in time of domestic rebellion. See above, p. 144.

[3] As Oppenheim points out, Manchuria and Korea had become the theater of war, so that hostilities committed there by the belligerents against one another could not be classified as violations of neutrality. Hence he excuses the attack by the Japanese fleet upon two Russian ships, the *Variag* and the *Korietz*, in the territorial waters of Korea, but condemns the capture of the *Reshitelni* in the harbor of Chefoo. *International Law*, II, § 320.

[4] C. B. Elliott, "The Shantung Question," *Am. Journal*, XIII (1919), 706.

[5] See above, p. 144.

[6] The claim was, however, disallowed by decision of the Emperior Napoleon III, to whom the case was referred as arbitrator. Snow, *Cases*, 396.

CHAP. XXXI

Cases during the World War

During the World War two British cruisers, the *Kent* and the *Glasgow*, attacked on March 14, 1915, the German warship *Dresden* within the territorial waters of Chile surrounding an island off the mainland. While an apology was promptly offered by the British foreign secretary, it was explained that the *Dresden* was itself abusing the neutrality of Chile by a pretense of internment that was being made to cover an opportunity to commence hostilities anew.[1] In September, 1916, several German and Austro-Hungarian merchant vessels were captured by Allied warships in Greek territorial waters, and the captures were justified by the French Prize Council on the ground that acts of the enemy had already transformed the territorial waters of Greece into a "theater of war."[2]

b. Acts short of hostilities

What acts other than hostilities are to be regarded as in violation of neutral territory is a question that has raised numerous points of controversy. International practice has, however, found it more convenient to discuss these issues under the heading of neutral duties.[3] In general, the prohibitions of the two Hague conventions, dealing respectively with the rights and duties of neutral powers in war on land and in naval war, embody previously existing usages together with extensions to meet new conditions. In war on land belligerents are forbidden to move troops or to transport munitions of war or other supplies across the territory of a neutral power.[4] They are likewise forbidden to erect wireless telegraph stations or other apparatus upon neutral territory, or to use any such apparatus set up by them before the war for military purposes.[5] Corps of combatants may not be formed nor recruiting offices established in neutral territory.[6] Defeated belligerent troops may not take refuge in neutral territory unless the neutral state consents to receive them, in which case they are under obligation to observe the rules prescribed by the neutral state in pursuance of its own obligations of neutrality.[7]

In naval war similar prohibitions apply. The exercise by a belligerent of the right of visit and search of merchant vessels is

[1] See Garner, *International Law and the World War*, II, § 562.
[2] The *Tinos*, and other cases. French Prize Council, 1917. Scott, *Cases*, 855.
[3] See below, Chap. XXXIII.
[4] Art. 2, Convention respecting the Rights and Duties of Neutral Powers and Persons in War on Land.
[5] Art. 3. See further, the rules drawn up by the Commission of Jurists at the Hague in 1923 concerning the control of radio in time of war. "General Report," Part I. *Am. Journal*, XVII (1923), Supp., 242.
[6] Art. 4.
[7] See below, p. 557.

forbidden, being included in acts of hostility.[1] Prize-courts may not be set up by a belligerent in neutral territory.[2] Belligerents are forbidden to use neutral ports and waters as a base of naval operations, and to erect wireless stations for communication with belligerent forces on land or sea.[3] Moreover, belligerents are in general under obligation to observe the restrictions imposed by the neutral state upon belligerent warships and their prizes in respect to admission into its ports, including the repairs that may be made, the supplies that may be taken on, the time of stay in port, the order of departure for vessels of the opposing belligerents, etc.[4] Any violation of these conditions and restrictions constitutes a violation of the neutrality of the state, greater or less in degree according to the circumstances.

Cases during the World War

During the World War belligerent warships on a number of occasions violated the conditions attending the hospitality of neutral ports. In a note of December 24, 1914, the American secretary of state justified the action of port officials in denying clearance to German merchant vessels carrying supplies or fuel to German warships on the ground that the "repeated departure" of such vessels made the port a base of naval operations for the belligerent.[5] Again, on March 27, 1915, the United States requested the British Government to prevent the recurrence of "violations of the territorial waters of the United States" by British cruisers taking on coal and other supplies along the coast of California.[6]

Case of the *Appam*

A conspicuous case was that of the *Appam*, a British merchant vessel captured by the German cruiser *Moewe* and brought on February 1, 1916, by a prize-crew to the port of Norfolk to be interned. The question was raised as to the status of the *Appam* under the Prussian-American treaties of 1799 and 1828, as well as under the existing rules of international law. Interpreting the provisions of the treaties strictly, the Department of State held that they did not grant the privilege of indefinite asylum in the United States.[7] Libel proceedings were begun against the vessel on the ground that its presence in port was in violation of the neutrality of the United States, a fact, which, it was claimed,

[1] Art. 2, Convention concerning the Rights and Duties of Neutral Powers in Naval Warfare.

[2] Art. 4. [3] Art. 5. [4] Art. 12-21.

[5] See Stowell and Munro, *International Cases*, II, 290. *Am. White Book*, II, 31.

[6] *Am. White Book*, II, 33. For other instances of a similar character, see Stowell and Munro, *International Cases*, II, 290-321.

[7] *Am. White Book*, III, 335-337.

CHAP. XXXI

operated to defeat the title of the captors and restore the vessel to its original owners. Upon appeal to the Supreme Court, it was held by that body that the effort "to make of an American port a depository of captured vessels with a view to keeping them there indefinitely" was a breach of neutrality as tested by the traditional policy of the United States and by the provisions of the Hague Convention concerning the Right and Duties of Neutral Powers in Naval War.[1]

c. Right of neutral state to protect its citizens and their property

While the right of a neutral state in respect to the inviolability of its territory is absolute, provided only that it enforces its neutrality against both belligerents impartially, the further right of the neutral state to protect its citizens resident in one or other of the belligerent states, or resident at home and maintaining commercial relations with one or the other of the belligerents, is limited and restricted by the right of the belligerent states to conduct the operations of war. Within this field have arisen, during the past two centuries, numerous conflicts between neutral and belligerent claims which have been the cause of acute controversies, often leading to war, and which still for the most part await the adoption of a constructive rule of law. These conflicts of claims relate in war on land to the status of neutral persons and their property within belligerent territory under the control of the *de jure* government or under occupation of the enemy.[2] In maritime war they relate primarily to the effect upon neutral persons and property of the belligerent right to capture and destroy enemy vessels, and to the effect upon neutral property of the belligerent right to maintain blockade and to capture contraband goods.[3]

Liability of neutral aliens to military service

As a general rule, a neutral state cannot demand that its citizens permanently resident in the territory of a belligerent shall enjoy any exemption from the additional burdens which the belligerent state may find it necessary to impose upon its own subjects. Practice appears to sanction the right of the neutral to protect its nationals from being drafted against their will into the military service of the belligerent; but this right appears to be contingent

[1] Berg *v.* B. and A. Steam Navigation Co., 243 U. S., 124 (1917). The provisions of the Hague convention referred to were Art. 21-22, eliminating Art. 23 to which the United States had entered a reservation. See below, p. 559, n. 2. For further instances presenting similar facts raising the question of neutral duties rather than neutral rights, see below, p. 557.

[2] See below, p. 529.

[3] See above, p. 496; below, pp. 537, 547. For the special question of the right of a neutral state to require the innocent passage through belligerent territory of diplomatic officers coming to it from the other belligerent, see above, p. 367.

upon the exercise by such persons of an option to depart from the territory within a reasonable period. During the American Civil War, and again during the World War, the United States claimed the right as a belligerent to exact military service of aliens, not including alien enemies in 1917, who had declared their intention of becoming citizens,[1] although adjustments were made in some cases where the act of 1917 came into conflict with treaty provisions.[2]

Liability to other special burdens

With the qualified exception of compulsory military service, neutral aliens are in all other respects, such as liability to special war taxation and to the requisitioning of their property, in the position of citizens of the belligerent state. No compensation is due them for losses incurred in consequence of military operations, whether inflicted by the *de jure* government or by the invading army or army of occupation.[3] The fact of domicile in the belligerent state raises a presumption that the alien has cast in his fate with the local population, and provided there be no discrimination in the personal restrictions or financial burdens to which he is subjected there will be no ground for intervention on the part of his state of allegiance. "Forced loans," where not in violation of treaty obligations, are legitimate if not a cloak for confiscation of property. While the requisition of property might under circumstances be ground for complaint even in the absence of discrimination, the test of its legality is normally the method of exaction.[4] It should be observed that, in consequence of the failure of the Second Hague Conference to agree upon the status of neutrals in belligerent territory, the Final Act expressed a wish "that the Powers should regulate, by special treaties, the position, as regards military charges, of foreigners residing within their territories."[5]

Belligerent right of angary

As in the case of neutral property permanently located in a belligerent state, neutral property which is only temporarily within belligerent territory may not be seized without full compensation

[1] The Act of Congress of 1863 allowed sixty-five days within which aliens liable to service might leave the country. In 1918 Congress offered aliens the option of submitting to the draft or else of having their declaration of intention canceled and being debarred from becoming citizens at any future time.

[2] For a list of such treaties, see Hyde, *International Law*, II, 254, n. 1. On the general subject see *ibid.*, II, §§ 625-627; Kingsbury, *Proceedings*, Am. Society, V, 219; Borchard, *Diplomatic Protection*, Part I, Chap. VI.

[3] For the special case of losses inflicted upon neutrals in time of civil war and domestic insurrection, see the Calvo Doctrine, above, p. 159.

[4] See Hyde, *op. cit.*, II, §§ 631-632.

[5] See Higgins, *Hague Peace Conferences*, 85-86.

CHAP. XXXI

being made. An old rule of international law, dating from the Middle Ages, recognized the belligerent *right of angary*, by which neutral vessels might be seized in the ports of a belligerent and made to transport troops and supplies.[1] In its modern form the right of angary is confined to the requisitioning of the vessels themselves or other property, such as the rolling-stock of railways, upon payment of compensation. In 1871 the German general in command at Rouen seized some British coal vessels and sank them in the Seine to prevent French gunboats from coming up the river. Indemnities were paid to the owners of the vessels.[2] During the same war the Germans seized a large number of Swiss railway cars found upon French territory. At the First and Second Hague Conferences a conflict of views with respect to the right to requisition neutral railway carriages resulted in the adoption of a compromise agreement, to the effect that railway material coming from the territory of neutral powers should not be requisitioned or utilized by a belligerent "except where and to the extent that it is absolutely necessary." Moreover, "it shall be sent back as soon as possible to the country of origin."[3] The two conditions attached to the agreement leave much latitude to the belligerent; but on the other hand compensation must be made, and the neutral state may likewise, in case of necessity, requisition railway material belonging to the belligerent.[4]

Practice during the World War

During the World War the right of angary was given wide application. Four warships, under construction in British dockyards for the neutral states of Chile and Turkey, were promptly taken over by the British Government.[5] In the case of the *Zamora*,[6] a Swedish vessel bound from New York to Stockholm with a cargo of grain and copper was brought into a British port to be searched. The War Department applied to the Prize Court to be allowed to requisition the copper under the terms of an order in council. The Prize Court affirmed the right of requisition in broad terms, but upon appeal to the Judicial Committee of the Privy Council

[1] Upon the general subject of angary, see Albrecht, *Requisitionen von Neutralem Privateigentum*, translated by Henckels and Crocker, in *Authorities on the Law of Angary*, Department of State, Confidential Document, 1918. Also, J. E. Harley, "The Law of Angary," *Am. Journal*, XIII (1919), 267; C. L. Bullock, "Angary," *British Year Book of International Law*, 1922-23, p. 99.

[2] Moore, *Digest*, VI, 904.

[3] Art. 19, Convention concerning the Rights and Duties of Neutral Powers and Persons in War on Land.

[4] *Ibid.*

[5] See Phillipson, *International Law and the Great War*, 72.

[6] L. R. 1916, 2 App. Cas., 77. Scott, *Cases*, 733; Evans, 619.

it was held that while "a belligerent power has by international law the right to requisition vessels or goods in the custody of its prize-court pending a decision of the question whether it should be condemned or released," the right was subject to certain limitations, chiefly that the vessel or goods in question must be urgently needed for the defense of the realm and that the right must be enforced by application to and in accordance with the judgment of the prize-court upon the circumstances of the case. In the absence of satisfactory evidence that the copper was urgently needed for national purposes, the court authorized a claim for damages, restoration of the goods being impossible.[1]

Requisition of Dutch merchant vessels in 1918

Following the entrance of the United States into the war in 1917, a number of Dutch merchant vessels were tied up in American ports owing to the unwillingness of the United States to furnish them with the necessary coal and with export licenses for their cargoes. An attempt was made by the United States to reach an agreement with the Dutch Government by which these ships might be taken over by the United States in return for supplies of food. Unable to conclude such an agreement, the President, by proclamation of March 20, 1918, authorized the secretary of the navy to take possession of the Dutch vessels and to employ such of them as might be "necessary for essential purposes connected with the prosecution of the war." The measure was justified by the President as being in accordance with the "law and practice of nations."[2] Similar action was taken by the British Government with respect to Dutch vessels lying within its ports. In both cases the Dutch Government protested, taking its stand, however, rather upon the general principles of justice than upon the technical law of angary.[3]

Angary applied by neutral states

A novel feature of international practice during the World War was the action of neutral states in requisitioning belligerent merchant vessels in their ports. In 1915, Italy, while still a neutral, seized German vessels in its ports; and in 1916 Portugal

[1] For further discussion of the *Zamora*, see *Am. Journal*, XI (1917), 266.

[2] *Official Bulletin*, March 21, 1918, II, No. 263; *Am. Journal*, XII (1918), Supp., 259.

[3] On August 3, 1917, the Shipping Board, in pursuance of an act of Congress, requisitioned two vessels under construction in American yards for Norwegian subjects, and canceled the contracts for thirteen other vessels. By award of a special arbitration court, rendered October 13, 1922, the United States was called upon to pay damages to the amount of $12,239,852. In forwarding to the Norwegian minister a check for the amount Secretary Hughes rejected the alleged rules of law upon which the decision was based. See *Am. Journal*, XVII (1923), 287, 362, 399; XVI (1922), 81.

CHAP. XXXI

took similar action. In the case of Portugal justification was offered on the ground of the existence of a national emergency; but since compensation had not been agreed upon in advance, as provided for in a treaty of 1908, Germany protested against the measure and declared war. In the closing months of the war Spain took over the German vessels in her ports as a means of making good the losses incurred from the German submarine campaign, no indemnity being paid in this case.[1]

d. Acts forfeiting neutral status

At the second Hague Conference an effort was made to define the conditions under which a neutral citizen would be deprived of his neutral status irrespective of his place of residence. It was provided that he must not commit hostile acts against a belligerent, nor, as respects the one belligerent, must he commit acts in favor of the other belligerent, such as taking service in the armed forces.[2] Certain acts were, however, specified as not being acts in favor of one belligerent as against the other, such as the furnishing of supplies or the making of loans, provided that the person doing these acts was not living in territory under the control of the other belligerent and that the supplies did not come from such territory; also "services rendered in matters of police or civil administration."[3]

Neutral persons on belligerent merchant ships

In maritime warfare the right of the neutral state to protect its citizens in their person and property comes into conflict in the first instance with the belligerent right to capture and destroy enemy merchant vessels.[4] Prior to the advent of the submarine the rules of international law in this field had become fairly clear. Neutral citizens taking passage upon belligerent merchant vessels shared the fate of nationals of the belligerent state in cases where the merchant vessel endeavored to escape pursuit or offered forcible resistance to visit and capture. Where no resistance was offered, neutrals merely shared with other passengers the inconveniences of diversion of the vessel to other ports than that of their original destination.

Neutral goods on belligerent ships

The status of neutral goods found on captured belligerent merchant vessels was a subject of controversy down to the time of the Declaration of Paris in 1856, being closely associated with the rule governing belligerent goods found upon neutral vessels. Two conflicting doctrines were advanced upon the subject, the one

[1] See Harley, *Am. Journal*, XIII, 267.

[2] Art. 17, Convention concerning the Rights and Duties of Neutral Powers and Persons in War on Land.

[3] Art. 18, *ibid.*

[4] See above, pp. 495, 511.

holding that neutral goods, otherwise innocent, did not lose their neutral character by being carried in an enemy ship, the other attributing to such contact the taint of enemy character. Early custom, following the rule laid down in the Consolato del Mare,[1] made the *ownership* of the goods the test of liability to capture, thus exempting neutral goods from confiscation when carried upon enemy ships and making enemy goods liable to confiscation when carried upon neutral ships. French practice, as illustrated in the Ordonnance of 1681, tended to follow the harsher rule of condemning neutral goods found in enemy ships, while penalizing neutral ships for carrying enemy goods. On the other hand, Holland, primarily interested as a neutral state in maintaining its carrying trade, began in 1650 to conclude treaties stipulating that "free ships" (i.e., neutral ships) should make "free goods"; although in order to purchase this concession from belligerents the Dutch were obliged to concede the parallel rule of "enemy ships, enemy goods," thus allowing neutral goods to share the fate of the enemy vessel.[2] The First Armed Neutrality of 1780, under the leadership of Russia, asserted the exemption of belligerent cargoes in neutral vessels, without, however, conceding the liability of neutral cargoes in enemy vessels.[3]

Great Britain, as the leading maritime power, consistently followed the old rules of the Consolato del Mare, though on occasion concluding treaties in a contrary sense. In like manner the courts of the United States enforced the traditional British rules, except in cases where there were treaty obligations to the contrary. In the case of the *Nereide*[4] Chief Justice Marshall was able to declare in 1815 that it had been "fully and unequivocally recognized by the United States" that "the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend found in the vessel of an enemy are to be restored."[5]

[1] See above, p. 17.

[2] A survey of the long controversy may be found in Hall, *International Law*, §§ 254-256.

[3] See on the general subject, Scott, ed., *The Armed Neutralities of 1780 and 1800*.

[4] 9 Cranch, 388. Evans, *Cases*, 544.

[5] The chief justice was also of the opinion, mistakenly, that the rule was "a part of the original law of nations, as generally, perhaps universally, acknowledged." *Ibid.* It should be observed that while the courts of the United States were laying down the liability of enemy goods to capture in neutral bottoms, the executive department, solicitous to protect the interests of the United States as a neutral, sought to establish the rule of "free ships, free goods," concluding a number of treaties to that effect, as, for example, the treaty of 1854 with Russia. See Moore, *Digest*, VII, § 1195.

In 1854 Great Britain and France, finding it necessary to adopt a common policy against Russia, agreed upon the more liberal practice of exempting from capture enemy goods in neutral bottoms and neutral goods in enemy bottoms. At the close of the war the Declaration of Paris of 1856 confirmed the practice as a rule of contractual law, providing that "the neutral flag covers enemy's goods, with the exception of contraband of war," and that "neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag." [1]

A few minor points are worthy of mention. First, the neutral owner of goods shipped upon an enemy vessel must suffer the loss incident to the capture of the vessel and its diversion to a port other than that of its original destination. Secondly, British and American decisions conflicted as to the status of neutral goods shipped in a belligerent armed vessel, the former holding (*obiter*) in the case of the *Fanny* [2] that such condition was evidence of intent to resist visit and search, and rendered the goods liable to forfeiture, the latter holding in the case of the *Nereide* [3] that the neutral character of goods was not lost by reason either of the armament or of the resistance of the vessel, provided the neutral himself did not directly participate in the resistance.

Transfer of belligerent vessels to neutral flag

Has a neutral citizen the right to purchase merchant vessels belonging to citizens of a belligerent when such transfer of ownership would have the effect of depriving the other belligerent of the right to capture such vessels upon the high seas? [4] The question is highly controversial. Down to 1908 Great Britain and the United States followed the rule that such transfers were valid when bona fide; that is, when no right of repurchase was reserved by the vendor and no right to share in profits. In the case of the *Noydt Gedacht*,[5] a small Dutch fishing-vessel which had been transferred to a neutral was condemned as Dutch property because of a condition in the bill of sale to reconvey at the end of the war. In the case of the *Benito Estenger*,[6] a Spanish vessel sold by its owners to a British firm after the outbreak of war and captured by a

[1] For the text of the declaration, see Higgins, *The Hague Peace Conferences*, 1.

[2] 7 Dodson, 443 (1814). Scott, *Cases*, 1012.

[3] 9 Cranch, 388 (1815). Scott, *Cases*, 1014.

[4] Stated in more strictly legal terms, has a neutral state the right to protect the title of its citizens to property so purchased?

[5] 2 C. Rob., 137, note. Scott, *Cases*, 1022. See also the *Ariel*, 11 M. P. C., 119. Cobbett, *Cases*, II, 144.

[6] 176 U. S., 568 (1900). Scott, *Cases*, 1029; Evans, 583.

United States cruiser, was condemned as lawful prize on the ground that the transfer was "merely colorable" and the original owner still retained a beneficial interest in the vessel. On the other hand, France and Russia refused to recognize even bona fide transfers when made after the outbreak of war. It may be added that British and American courts did not, however, recognize the validity of transfers of public armed vessels.[1]

Provisions of the Declaration of London

At the London Naval Conference of 1908-09 an attempt was made to reconcile conflicting views.[2] The result was that the Declaration of London made a distinction between the transfer of an enemy vessel to a neutral flag *before* and *after* the outbreak of hostilities. In the former case the transfer was valid "unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve." Conditions were laid down under which the presumption should be *for* or *against* the validity of the sale.[3] In the case of a transfer made *flagrante bello,* the presumption was against the validity of the sale, and became an absolute presumption when the transfer had been made during a voyage, or in a blockaded port, or where there was a right of redemption or recovery.[4]

Practice during the World War

During the World War questions of transfer gave rise to a number of controversies. Germany sold to Turkey, while neutral, two warships, the *Goeben* and the *Breslau,* interned at the time in Turkish ports.[5] A number of German merchant vessels were transferred to American registry under conditions suggesting a retention of ownership, in whole or in part, by German nationals. The *Brindilla,* the *Platuria,* and the *Petrolite* were released by British prize-courts on the ground that, while originally flying the German flag, they had in fact been owned by American citizens.[6] In the case of the *Dacia,*[7] a German vessel lying in an American port was purchased by an American citizen and admitted to American registry. Being captured in February, 1915, by a French cruiser she was condemned as lawful prize in accordance

[1] See the case of the *Georgia,* 7 Wallace, 32 (1868), where a Confederate armed vessel, which had been sold to a British citizen and then dismantled and fitted up for purposes of commerce, was condemned as prize. Scott, *Cases,* 1022, n. 55.

[2] A summary of the opposing points of view may be found in Higgins, *op. cit.,* 600 ff.

[3] Art. 55.

[4] Art. 56.

[5] See Phillipson, *International Law and the Great War,* 318 ff.

[6] Garner, *op. cit.,* I, § 124.

[7] French Council of State, 1916. Scott, *Cases,* 1033. The decision of the lower prize-court may be found in *Am. Journal,* IX (1915), 1015.

with Article 56 of the Declaration of London, which the French prize-court chose to recognize as binding.[1]

[1] The British Government, on being approached in advance, had refused to state what action it would take.

In 1915 a bill was introduced in the United States Congress providing for the purchase of German merchant vessels by corporations financed in part by the Government. It drew, however, sharp criticism as a violation of neutrality and failed of passage. Upon the general subject, see Garner, *op. cit.*, I, Chap. VII; E. M. Borchard, "Transfer of Flag and the Declaration of London," *Columbia Law Review*, XXIII (1923), 338-357.

CHAPTER XXXII

CONFLICT OF NEUTRAL RIGHTS OF TRADE WITH THE BELLIGERENT RIGHT TO MAINTAIN BLOCKADE AND TO CAPTURE CONTRABAND

a. Opposing doctrines of blockade

The conflict between the right of a neutral state to protect the commerce of its citizens and the right of a belligerent state to blockade the ports of its enemy has marked the history of international relations for the past three centuries. Grotius found it necessary to discuss the subject on the basis of the natural law, in the absence of rules of customary law.[1] Shortly after, in 1630, the Dutch instituted a formal blockade of certain ports of Flanders and imposed upon offenders the penalty of confiscation of vessel and cargo. By the close of the eighteenth century two fairly distinct doctrines of blockade had developed, the one, supported mainly by Great Britain, favoring the side of the belligerent, the other, supported mainly by Holland, favoring the claims of neutrals. The Armed Neutralities of 1780 and 1800 directed their protests against blockades legally established although not effectively maintained.[2] The United States, suffering from the British and French blockades during the Napoleonic Wars, championed the cause of neutrals; but when itself a belligerent in 1861-65 the American Government extended the scope of existing rules to make its own blockade of the Confederate States more effective. Aside from the vague principle laid down by the Declaration of Paris in 1856, that a blockade to be binding must be effective, the practice of states was still in a state of uncertainty in 1914. The Declaration of London, drawn up in 1909, presented, it is true, a comprehensive and fairly precise code of law upon the subject; but the failure of some of the leading powers to ratify it left the whole subject, so far as actual practice was concerned, in the state it was before the Declaration.

Scope of a blockade

A blockade need not be limited, as in earlier times, to the investment of fortified ports. It may extend to all ports of the enemy state, including, if necessary, the entire coast-line, as in

[1] *De Jure Belli et Pacis* (Eng. trans.), Bk. III, Chap. I, § V.
[2] *The Armed Neutralities of 1780 and 1800*, 299, 531.

CHAP. XXXII

the case of the blockade of the Confederate States in 1861-65. Whether an international river may be blockaded, when such action would interdict neutral commerce, remains unsettled. In 1854 the mouth of the Danube was blockaded by the enemies of Russia in spite of the protest of neutral states. On the other hand, the United States refrained from blockading the Rio Grande in 1861-65,[1] and the French made exception of the Ems River in their blockade of Germany in 1870. The Declaration of London provided that "a blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy," and that "the blockading forces must not bar access to neutral ports or coasts."[2]

Effectiveness of blockade

The chief controversial issue concerns the effectiveness of the blockade maintained by the belligerent. The Declaration of London stated a rule of customary law in providing that "in accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective,—that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coastline," and further, that "the question whether a blockade is effective is a question of fact."[3] The meaning attached to these somewhat tautological provisions is not that a blockade ceases to be a blockade because individual vessels may succeed in breaking it successfully, but that a blockade, to be legal, must present an actual danger to vessels attempting to evade it. In the leading case of the *Betsey*[4] the British Court of Admiralty held that the mere proclamation that the port of Guadaloupe had been put in a state of "complete investment and blockade" did not constitute a legal blockade justifying condemnation of an American vessel which had entered the port. In the case of the *Franciska*[5] the British Privy Council released a captured vessel on the ground that the blockade of Riga was invalid by reason of the fact that belligerent subjects had been authorized to trade with the blockaded port.[6] In the case of the *Olinde Rodrigues*[7] the Supreme Court of the

[1] See the case of the *Peterhoff*, below, p. 545.

[2] Art. 1, 18. The translation of the declaration cited in the text is that printed for the use of the United States Senate. See Charles, *Treaties*, 268 ff. It differs verbally from the official British text printed in Higgins, *Hague Peace Conferences*, 540 ff.

[3] Art. 2, 3.

[4] 1 C. Rob., 93 (1798). Scott, *Cases*, 932; Evans, 644.

[5] 10 Moore P. C., 37 (1855). Scott, *Cases*, 944; Evans, 648.

[6] "No blockade," said the court, "can be legitimate which admits to either belligerent a freedom of commerce denied to the subjects of states not engaged in the war."

[7] 174 U. S., 510 (1899). Evans, *Cases*, 665. The vessel in this case was released for lack of evidence of intent to enter the blockaded port.

United States held that a single cruiser was adequate to maintain an effective blockade of the port of San Juan in Porto Rico.[1]

Notification

In addition to being effectively maintained, a blockade must be duly notified to neutral states. Before 1909 Great Britain and the United States held that notification must be made by diplomatic proclamation, and that, following such proclamation, knowledge of the blockade on the part of neutral vessels might be presumed. Moreover, mere notoriety of the existence of the blockade was held to be sufficient to raise a presumption of knowledge. In the leading case of the *Neptunus*[2] the British court ruled that the fact of official notification raised an absolute presumption of knowledge on the part of the neutral captain; nevertheless, the vessel, captured in attempting to enter the port of Havre, was released in this case owing to misinformation given to the captain by an admiral of the British fleet. In the case of the *Adula*[3] the Supreme Court of the United States upheld the legality of a *de facto* blockade of Guantánamo in 1898, although no proclamation of the blockade had ever been made.[4]

On the other hand, France and other continental states held that information of a blockade must be given to the vessel directly by the blockading fleet, so that, in effect, a neutral vessel could make a first test of the effectiveness of a blockade with impunity. This position was abandoned in the Declaration of London, which provided for a general declaration of blockade, with specification of details,[5] together with a notification of the blockade to neutral powers and to the local authorities of the blockaded port.[6] Mere *de facto* blockades thus became invalid. The liability of the neutral vessel to capture continued to be contingent upon its knowledge, actual or presumptive, of the blockade.[7]

Place of seizure

Prior to the Declaration of London conflicting views were held as to the time when the offense of breach of blockade might be committed and as to the place where a vessel might be seized.

[1] During the World War the operations of the submarine made it impossible to maintain the cordon of warships formerly regarded as an accompaniment of legal blockade on a large scale. The complete control of the seas by one of the belligerents made it possible, however, to maintain an effective blockade at greater distances from the blockaded coast.

[2] 2 C. Rob., 110 (1799). Scott, *Cases*, 935; Evans, 646.

[3] 176 U. S., 361 (1900). Evans, *Cases*, 661.

[4] For the important case of the *Circassian*, 2 Wallace, 135, dealing with the legality of the blockade of a port occupied by the forces of the blockading state, see Hall, *International Law*, § 263.

[5] Art. 8, 9, 10.

[6] Art. 11.

[7] Art. 14, 15, 16. France abandoned her earlier doctrine in 1914.

CHAP. XXXII

British and American courts enforced the rule that a vessel which sailed from its port of departure with the intention to break blockade might be seized at any point on its voyage toward the blockaded port, and that should the vessel succeed in breaking blockade it was liable to capture at any time during its return voyage. On the other hand, France, Italy, and other states looked upon a blockade as in the nature of a line drawn around the blockaded port, and held that the offense of breach of blockade consisted in attempting to cross this line. A compromise was effected in the Declaration of London which provided that "neutral vessels may not be captured for breach of blockade except within the area of operations of the warships detailed to render the blockade effective."[1]

b. Doctrines of "continuous voyage" and "ultimate destination"

During the American Civil War new conditions confronted by the blockading fleet resulted in the introduction of new doctrines of blockade. Neutral vessels were captured on their way to neutral ports lying off the Confederate coasts, and were condemned on the ground that the neutral ports were only stopping-places and that the ultimate destination of the vessel was a blockaded port. This doctrine, already applied by British courts in dealing with prohibited colonial trade,[2] was known as the doctrine of "continuous voyage." Moreover, the further and more important innovation was introduced that where the vessel itself had a bona fide neutral destination, but its cargo, after being deposited in the neutral port, was to be transshipped to a smaller and swifter vessel to be used as a blockade-runner, the said cargo, whether contraband or not, was liable to seizure. The term "continuous transports," or the doctrine of "ultimate destination," has been applied to the rule governing such cargoes. In the leading case of the *Springbok*[3] the Supreme Court condemned the cargo of a British vessel captured *en route* to Nassau on the ground that the character of the cargo was such as to indicate that its true destination was a blockaded port. "We cannot doubt," said the court, "that the cargo was originally shipped with intent to violate the blockade;

[1] Art. 17. For the penalty for breach of blockade, see The *Panaghia Rhomba*, 12 Moore, P. C., 168 (1858), and The *Wren*, 6 Wallace, 582 (1867). Scott, *Cases*, 951, 954. For a modified rule introduced during the World War, see below, p. 541.

[2] See the Rule of 1756, below, p. 549. The doctrine appears to have been extended to blockade first by France during the Crimean War. See the *Frau Houwina*, Imperial Prize Court, May 26, 1855. Scott, *Cases*, 995.

[3] 5 Wallace, 1 (1866). Evans, *Cases*, 729; Stowell and Munro, *Cases*, II, 392.

that the owners of the cargo intended that it should be transhipped at Nassau to a smaller vessel more likely to succeed in reaching safely a blockaded port than the *Springbok*: that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of the voyage, attached to the cargo from the time of sailing."[1]

The rule applied in the case of the *Springbok* brought forth sharp criticism from neutral states as having the effect of extending the blockade of enemy ports to neutral ports as well. A committee of the Institute of International Law condemned the theory as "a serious inroad upon the rights of neutral nations."[2] Finally, the Declaration of London rejected it in laying down the provision that "whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port."[3]

Practice during the World War

During the World War the existing rules of blockade were enlarged and extended to meet conditions for which no provision had been made. On February 4, 1915, in retaliation for British measures taken in the North Sea, Germany issued a decree making the waters surrounding the British Isles a war zone within which all enemy vessels, of commerce as well as of war, would be sunk without warning. This war zone did not constitute a blockade in the strict sense, both because it failed to meet the test of effectiveness and because it was not directed against neutral trade with the enemy. By way of retaliation, Great Britain announced on March 1, 1915, that it was her intention "to detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin."[4] The procedure was not designated as a blockade and was not planned to conform to the conditions of a valid blockade. An order in council of March 11 provided that all vessels of enemy destination be required to discharge their

[1] With respect to the *character* of the cargo the court observed that it referred to it only as evidence of its distination; for "contraband or not, it could not be condemned if really destined for Nassau and not beyond; and contraband or not, it must be condemned if destined to any rebel port."

For cases illustrating the doctrine of ultimate destination as applied to contraband, see below, p. 544. The student should observe that in many cases the courts failed to distinguish carefully between the rules governing blockade and those governing contraband, with resulting confusion on the part of critics and commentators.

[2] Cited by Moore, *Digest*, VII, 732.

[3] Art. 19.

[4] Garner, *op. cit.*, II, § 511.

CHAP. XXXII

goods in a British port and that vessels of neutral destination *might* be required to do the same.[1] The United States refused to accept the plea of retaliation in justification of illegal measures injurious to neutral states, and protested against the provisions of the order as constituting "a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area."[2] In reply the British Government pointed out that the neutral countries adjacent to Germany afforded her convenient opportunities for carrying on trade with foreign countries, and that a blockade limited to enemy ports "would leave open routes by which all kinds of German commerce could pass almost as easily as through the ports in her own territory.[3] If, it was argued, the United States might, when a belligerent, intercept goods destined for enemy territory before they reached the neutral ports from which they were to be reëxported,[4] was it unfair for Great Britain to pursue the same methods when the second stage of the journey was by land?

Rationing of neutral countries

Pursuant to the policy of cutting off all goods destined to the enemy, Great Britain and France adopted a system of "rationing" neutral countries, so as to deny them food and other commodities to replace their own domestic supplies which were being sold to Germany. Upon the entrance of the United States into the war an embargo was placed upon the shipment of a large number of commodities to the neutral countries adjacent to the Central Powers, except upon condition of obtaining a license from the President.[5] This system was the subject of many complaints from neutral states, which contested the statistics upon which the rationing was carried out. With the United States a belligerent, however, the protest of neutrals was of no avail, and the war closed with the doctrine of "ultimate destination" applied in the most rigid form. The final outcome of practice during the World War was, therefore, to leave the whole law of blockade in a much more unsettled condition than it was in 1907.[6]

The right of a belligerent to intercept goods of a military char-

[1] Scott, *Cases*, 1175, 1177.

[2] Note of March 30, 1915, *Am. White Book*, I, 69 ff. See also note of October 21, 1915. *Ibid.*, III, 25 ff.

[3] Note of July 24, 1915. *Ibid*, II, 179.

[4] For the reference in mind, see above, p. 540.

[5] See the instance of the Dutch ships detained in port for lack of licenses, above, p. 531.

[6] For a general discussion of practice during the World War, see Garner, *op. cit.*, II, Chap. XXXIII; Hyde, *International Law*, II, 829-832.

c. What is contraband?

acter on their way to the enemy was at the time Grotius wrote only another aspect of the right to maintain blockade. Both were means by which a belligerent sought to isolate the enemy, and the capture of contraband goods was merely an extension of the scope of blockade beyond the enemy port. The question which Grotius set out to answer remained a subject of international controversy until the adoption of the Declaration of London: what articles destined to the enemy are to be regarded as of such military advantage to him as to warrant the belligerent in capturing them, as well as the vessel carrying them? Arms and other munitions of war were obviously of such character, and Grotius was of the belief that a neutral furnishing them became "of the party of the enemy."[1] On the other hand, there were articles that were of no use in war; and the carriage of these was, therefore, not a matter of complaint by the belligerent. But, again, there were objects "useful both in war and out of war, such as money, provisions, ships, and other fittings." These, it was stated, might be intercepted by the belligerent according to the circumstances of the war, when their carriage to the enemy would prolong his resistance.[2]

Opposing doctrines

The classification offered by Grotius became the basis of the British, and later of the American, doctrine of contraband.[3] A long and comprehensive list of articles was drawn up and divided between those which were absolute contraband under all circumstances and those which were only conditional contraband depending upon evidence of their intended use for military purposes. The application of the doctrine of conditional contraband, however, frequently involved nice distinctions which left much latitude to the judgment of the prize courts. In contrast with the British and American doctrines, France and other continental states ruled out the class of occasional or conditional contraband, and limited the list of absolute contraband to a smaller number of articles. In both cases the lists of contraband articles changed frequently; and in some instances treaty provisions made the same article contraband with respect to one contracting power and non-contraband with respect to another.[4]

A final settlement of the long controversy was attempted in

[1] *De Jure Belli et Pacis* (Eng. trans.), Bk. III, Chap. I, § V.

[2] *Ibid.*

[3] The case of the *Peterhoff*, 5 Wallace, 28 (1866), offers a modern application of the classification introduced by Grotius. See below, p. 545.

[4] A good survey of the development of the law may be found in Hall, *International Law*, §§ 237-239.

CHAP. XXXII

Provisions of the Declaration of London

the Declaration of London. A specified list of articles of absolute contraband was drawn up, which might be supplemented by other articles "exclusively used for war" upon notification by a particular state.[1] This list was followed by a second list of articles of conditional contraband, being articles "susceptible of use in war as well as for purposes of peace." This list might also be extended to other similar articles by special notification.[2] Conspicuous in this list were "foodstuffs," which had been regarded by France and Russia as absolute contraband, as well as fuel, vessels, and railway material. A third or "free" list consisted of articles "not susceptible of use in war" which could not be declared contraband.[3] Among other items in this list were raw cotton, wool, hemp, and rubber.

The question of destination

Closely associated with the problem of determining what articles could be classed as contraband of war was that of determining the destination of the goods. No difficulty was presented in the case of articles of absolute contraband, since their character indicated that if destined to any part of the enemy territory they were intended for the use of the army or navy. The Declaration of London confirmed the customary rule in this respect.[4] Proof of enemy destination was regarded as complete when the goods were documented for discharge in an enemy port, and when the ship's papers indicated an enemy port as the first port of call. In other cases the burden of proof of enemy destination was put upon the captor.[5] In the case of conditional contraband the goods must be destined for the use of the armed forces or of the government of the enemy. In the case of the *Jonge Margaretha* [6] a cargo of cheeses captured on their way from Amsterdam to Brest, a French port of naval equipment, was condemned as contraband, although the same cargo would have have been exempt, as intended for "civil use," had it been destined to "a general commercial port." Again in the case of the *Commercen* [7] a Swedish vessel carrying a cargo of grain to the neutral Spanish port of Bilboa was captured and its cargo condemned as being destined for the use of the British fleet lying in the harbor. The Declaration of London adopted the British-American doctrine on this point, and included special provisions dealing with presumption of destination.[8]

[1] Art. 22, 23. [2] Art. 24, 25. [3] Art. 28.
[4] Art. 30. [5] Art. 31, 32.
[6] 1 C. Rob., 189 (1799). Evans, *Cases*, 672.
[7] 1 Wheaton, 382 (1816). Scott, *Cases*, 973.
[8] Art. 33, 34.

Immediate *versus* ulterior destination

What if the apparent destination of contraband goods be not their real destination? May a vessel be captured on its way to a neutral port when there is evidence of an ulterior destination to an enemy port, or when there is evidence that, although the vessel is to go no further than the neutral port, the cargo is to be transshipped in the neutral port and sent on by sea or by land to the enemy? During the American Civil War the courts of the United States took over the doctrine of "continuous voyage," applied by British courts to prohibited colonial trade,[1] and extended it to vessels carrying contraband goods. In the cases of the *Dolphin*[2] and the *Pearl*[3] two British vessels, together with their cargoes, were condemned upon proof of an ulterior enemy destination after reaching the neutral port of Nassau. More important, however, was the extension of the doctrine of continuous voyage to cargoes captured on their way to neutral ports under circumstances indicating subsequent enemy destination. In the case of the *Stephen Hart*[4] captured en route to Cardenas, Cuba, both vessel and cargo were condemned upon evidence that the latter, being contraband, had an ultimate enemy destination. A similar decision was rendered in the case of the *Bermuda*.[5]

In the case of the *Peterhoff*,[6] captured en route to Matamoras, Mexico, opposite Brownsville, Texas, that part of the cargo consisting of military articles whose evident destination was the Confederate States was condemned, although the vessel itself and its non-contraband cargo were released.[7] This doctrine became known as the doctrine of "continuous transport" or the doctrine of "ultimate destination,"[8] and it was sharply attacked at the time as an unwarranted innovation. Subsequently, however, it came to be more generally regarded with favor, and it was applied by Great Britain during the Boer War in the case of the German ship *Bundesrath*,[9] captured en route to the neutral port of Lorenzo Marques in

[1] See below, p. 549.
[2] 7 Fed. Cases, 862 (1863).
[3] 5 Wallace, 574 (1866).
[4] 3 Wallace, 559 (1865), affirming the decision of the district court. For the latter, see Scott, *Cases*, 988.
[5] 3 Wallace, 514 (1865).
[6] 5 Wallace, 28 (1866). Scott, *Cases*, 980; Evans, 677.
[7] The case of the *Springbok*, 5 Wallace, 1 (1866), in which the doctrine was applied to non-contraband articles, has been referred to under the head of Blockade. See above, p. 540.
[8] The doctrine of "continuous transport" must be distinguished from the earlier doctrine of "continuous voyage" which refers more properly to vessels than to cargo.
[9] Moore, *Digest*, VII, § 1262; Stowell and Munro, *Cases*, II, 409.

CHAP. XXXII

Delagoa Bay. In this instance the contraband cargo was condemned and the vessel released.

In the Declaration of London a compromise between conflicting views was effected. In the case of absolute contraband the doctrines of continuous voyage and continuous transport were affirmed in the form of a provision that "it is immaterial whether the carriage of the goods is direct or entails either transshipment or a subsequent transport by land."[1] In the case of conditional contraband, however, it was provided that it should not be liable to capture "except when found on board a vessel bound for territory belonging to or occupied by the enemy, and when it is not to be discharged in an intervening neutral port."[2] Where the enemy state had no seaboard (as, for example, in the case of the Boer War), the provisions of the article were not to apply.[3]

Practice during the World War

During the World War wholly new circumstances led Great Britain[4] to set aside not only the provisions of the Declaration of London but the traditional law enforced by the British courts as well. In the first place, the British Government, by orders in council, transferred numerous articles from the list of conditional contraband, as drawn up by the Declaration of London, to the list of absolute contraband, and, again, numerous articles from the free list to either the absolute or the conditional list. The designation of cotton and of food-stuffs as absolute contraband called for sharp protests from the United States. In the second place, Great Britain, by an order in council of October 29, 1914, extended the rule of continuous transport to conditional as well as to absolute contraband in cases where goods were consigned to order, unless the owner could prove neutral destination. In the case of the *Kim* and Others[5] a number of Norwegian and Swedish vessels carrying American-owned cargoes of food-stuffs, rubber, and hides were captured en route to Copenhagen and their cargoes condemned on the ground that they were consigned "to order" and that the circumstances indicated that they were ultimately destined to Germany. The above measures not proving effective, the British Government issued a proclamation on April 19, 1916, abolishing the distinction between absolute and conditional contraband.[6] This

[1] Art. 30. [2] Art. 35. [3] Art. 36.

[4] A similar policy was pursued by France, but was of less consequence to neutral states.

[5] Including the *Alfred Nobel*, the *Bjornstjerne Bjornson*, and the *Fridland*, L. R., 1915, p. 215. Evans, *Cases*, 735.

[6] Garner, *op. cit.* II, § 496.

step was justified by the Foreign Office on the ground that so large a proportion of the inhabitants of the enemy country were taking part, directly or indirectly, in the war that no real distinction could be drawn between the armed forces and the civilian population. Moreover, the fact that the German Government had taken over the distribution of articles on the list of conditional contraband made the distinction between the two classes meaningless.[1]

Rationing of neutral countries

Reference has already been made to the new practice introduced of "rationing" neutral states. As previously applied, the doctrine of continuous voyage did not condemn goods which were destined to be sold in the open market of the neutral port.[2] Yet it became clear that it was one and the same to the enemy whether the goods he desired were obtained directly from the original shipper or indirectly through neutral consignees. Again, the larger the volume of food-stuffs and other supplies neutral merchants could import, the larger the quantity of domestic produce that could be spared for overland shipment to the enemy. In consequence Great Britain undertook to determine the reasonable needs of the neutral countries and to hold that imports in excess of such amount must be presumed to reach Germany by the method of substitution. The result was that what was in effect a complete blockade of Germany was established. It was done, however, not by application of the rules governing blockade, but by an extended operation of the doctrines of contraband.[3]

d. Penalty for carriage of contraband

The penalty for carriage of contraband, according to Anglo-American practice, has been the confiscation of the contraband goods, together with the vessel carrying them when the latter belonged to the owner of the goods or when the owners were aware of the use to which the vessel was being put.[4] Non-contraband goods belonging to the owner of the contraband goods were likewise condemned. In general non-contraband goods were, by "a more mitigated practice" of later times, not confiscated, but merely held subject to a belligerent right of preëmption,[5] particularly in the case where they were the produce of the neutral country.[6]

[1] Compare on this point, E. M. Borchard, "The Resurrection of International Law," *Proceedings*, Am. Society of Int. Law, 1923, 61-66.

[2] See the case of the *Peterhoff*, 5 Wallace, 25 (1866). Above, p. 545.

[3] See above, p. 541.

[4] See the *Neutralitet*, 3 C. Rob., 295 (1801). Evans, *Cases*, 686. Also Carrington *v.* Merchants' Insurance Co., 8 Peters, 495 (1834). Scott, *Cases*, 975; Evans, 689.

[5] The *Haabet*, 2 C. Rob., 174 (1800). Scott, *Cases*, 968; Evans, 687.

[6] The *Sarah Christina*, 1 C. Rob., 237 (1799). Evans, *Cases*, 701, n.

CHAP. XXXII

The Declaration of London adopted a compromise rule, confiscating the vessel when the contraband goods formed more than half the cargo, as well as other goods belonging to the owner of the contraband.[1] During the World War Great Britain sought to reconcile neutral shippers to her various extensions of the law of contraband by providing for the preëmption of vessels and cargoes, other than absolute contraband, instead of their confiscation.[2]

e. Unneutral service

More or less analogous to the offense of carrying contraband is the act of a neutral vessel which transports enemy troops or despatches or which engages in the service of the enemy. By customary law such a vessel is subject to confiscation by reason of the business in which it is engaged, irrespective of its destination. In the case of the *Atalanta*[3] a Bremen ship and cargo were condemned because the vessel was captured when secretly conveying a packet containing despatches for the government of the Isle of France to the minister of marine at Paris. In the case of the *Friendship*[4] an American vessel was condemned for having, under contract with the French Government, undertaken to transport French military officers and marines. A similar decision was rendered in the case of the *Orozembo*[5] where only a small number of officers were being conveyed. The classic incident is that of the British mail-steamer *Trent,* which was stopped on its way from Havana to St. Thomas by an American cruiser in 1861 and two of its passengers, Mason and Slidell, Confederate commissioners to Great Britain and France, forcibly removed. The United States claimed that as despatches were clearly contraband "the bearers or couriers who undertook to carry them fall under the same condemnation," whereas Great Britain held that the character and office of the persons captured did not make them contraband. In consequence, however, of the act of the American captain in removing the commissioners from the vessel, rather than bringing the vessel before a prize-court, the United States complied with the demand of Great Britain and released the prisoners.[6]

[1] Art. 40, 42. For the effect of ignorance of hostilities and the provision for delivery of contraband goods at sea, see Art. 43, 44.

[2] See Phillipson, *International Law and the Great War,* 388. For the question of the ownership of goods in transit, see The *Sally,* 3 C. Rob., 300, n., and The *Miramichi,* L. R. [1916] Prob. Div., 71. Scott, *Cases,* 811, 819; Evans, 539, 554.

[3] 6 C. Rob., 440 (1880). Scott, *Cases,* 867; Evans, 640.

[4] 6 C. Rob., 420 (1807). Stowell and Munro, *Cases,* II, 447.

[5] 6 C. Rob., 430 (1807). Scott, *Cases,* 865; Evans, 637.

[6] For further details of this important incident, see Moore, *Digest,* VII, § 1265.

The Declaration of London adopted the position that while the mere carriage of persons belonging to the armed forces of the enemy afforded no ground for capture of the vessel, such individuals could be removed from the neutral vessel and made prisoners of war.[1] If, however, the vessel was undertaking a voyage for the express purpose of transporting individual passengers embodied in the armed forces of the enemy, or if it was, with knowledge, transporting a military detachment of the enemy, it was liable to condemnation.[2] The more serious offense of hiring itself out to the enemy placed the neutral vessel in the class of a merchant vessel of the enemy. In the case of the *Manouba*, a French steamer was taken into port by an Italian cruiser in 1912 and made to surrender a number of passengers of Turkish nationality. The Hague Court of Arbitration, to which the case was referred, decided that there was sufficient ground for believing that the passengers were members of the Turkish armed forces to warrant the demand for their surrender.[3]

Reservists during the World War

During the World War the status of reservists gave rise to a number of controversies. In October, 1914, the Spanish steamship *Federico*[4] was captured and confiscated by the French for having undertaken to transport from Barcelona to Genoa German and Austro-Hungarian passengers the majority of whom belonged by their ages to the classes mobilized by their governments. In November, 1914, a citizen of German birth, Piepenbrink, a steward on board an American steamer, was removed by a French cruiser and held prisoner. The United States demanded his release on the ground that he had declared his intention to become an American citizen, and claimed further that, irrespective of his citizenship, he was not to be regarded as "embodied in the armed forces of the enemy" as provided by the Declaration of London.[5] Again, the United States protested against the forcible removal in 1915 from the American steamship *China* of a number of German and other enemy subjects who, it was claimed by the British Government, were agents in the service of the enemy.[6]

The Rule of 1756

A special form of unneutral service, now possessing only historical interest, was responsible for the introduction of the doctrine of continuous voyage. By the Rule of 1756 Great Britain forbade

[1] Art. 47. [2] Art. 45.
[3] Scott, *Hague Court Reports*, 341. Stowell and Munro, *Cases*, II, 453.
[4] French Prize Court, 1915. Scott, *Cases*, 886. Garner, *op. cit.*, II, 371.
[5] *Am. White Book*, II, 133 ff.
[6] For a discussion of the general subject, see Garner, *op. cit.*, II 362-374.

CHAP. XXXII

neutral merchants to engage in time of war in the commerce between enemy colonial ports and the mother-country which was closed to them in time of peace. In the leading case of the *William*,[1] an American vessel had shipped its cargo at La Guaria and had then taken it to Marblehead, Massachusetts, where it was unloaded and then reshipped. Being captured en route to Bilboa, Spain, the vessel and cargo were condemned on the ground that the voyage from La Guaria to Bilboa, although broken, was in reality one continuous voyage.[2]

More serious than the offense of a neutral ship which carries enemy despatches or enemy troops is the offense of engaging in the service of the enemy by taking part in hostilities, or by acting under orders of the enemy government or under contract with the enemy government. Such acts, according to the Declaration of London,[3] place the neutral vessel in the class of enemy merchant vessels.

f. Visit and search

An incident to the right of a belligerent state to capture enemy vessels and neutral contraband goods is the right of belligerent warships to visit and search all vessels encountered upon the high seas. Notice of an intention to visit and search is given by firing a blank charge, or, if necessary, a shot across the bows. Resistance to visit and search on the part of neutral vessels, or the attempt to escape by flight, subjects them to the same penalties which are inflicted upon belligerent vessels.[4] Evidence of fraud in the vessel's papers is a ground for seizure irrespective of the character of the cargo.

Convoy

International practice varied before 1909 in respect to the status of a neutral vessel under convoy of public armed ships. Obviously, if the latter were enemy ships, to keep in their company would be equivalent to resistance. What if they were neutral public ships? In the leading case of the *Maria*[5] a Swedish merchantman, sailing under convoy of a Swedish ship of war, was condemned on the ground of sharing impliedly in the resistance offered by the frigate. On the other hand, continental states held

[1] 5 C. Rob., 385 (1806). Scott, *Cases*, 982; Evans, 725.

[2] See also the cases of the *Emanuel*, 1 C. Rob., 296 (1799), and the *Immanuel*, 2 C. Rob., 186 (1799). Scott, *Cases*, 926, 928. For an analogous case in which a breach of neutrality was made the ground of confiscation, see Darby *v.* The Brig *Erstern*, decided by the Federal Court of Appeals of the United States, 2 Dallas, 34. Scott, *Cases*, 880.

[3] Art. 46.

[4] See above, p. 511. The customary rule was confirmed by the Declaration of London, Art. 63.

[5] 1 C. Rob., 340 (1799). Scott, *Cases*, 1003; Evans, 535.

in general that neutral merchantmen were exempt from visit and search when under convoy of warships of their own nationality. This latter position was taken by the Declaration of London,[1] but even in the absence of that agreement the British practice had lost its point, owing to the better observance of neutrality by neutral governments.

g. Destruction of neutral prizes

Is it permissible for a belligerent to destroy neutral vessels which, after visit and search on the high seas, are found to be liable to confiscation? Until the beginning of the twentieth century international practice, while permitting the destruction of enemy vessels, required that captured neutral vessels be brought before a prize court for condemnation, and that if this could not be done they be released.[2] During the Russo-Japanese War the Russian navy sank a number of neutral prizes, notably the *Knight Commander*, a British vessel carrying a cargo of contraband to Japan. Compensation was refused by the Russian Prize Court.[3] At the second Hague Conference, and again at the London Naval Conference, a number of powers supported the position that neutral vessels could be sunk in case of imperative necessity.[4] A compromise was agreed upon in the Declaration of London, which provided that as a general principle neutral prizes were not to be destroyed, but as an exception they might be destroyed if the act of taking them into port "would involve danger to the warship or to the success of the operations in which she is engaged at the time."[5] Further provisions sought to regulate the conditions under which the destruction should be carried out.[6] The wide latitude of judgment left to belligerents by the provisions of the Declaration was, however, generally regarded by commentators as equivalent to giving the belligerent *carte blanche* to destroy.

Cases of destruction during the World War

During the World War the few German cruisers roaming at large found it impossible to bring their neutral prizes to port. On January 28, 1915, an American vessel, the *William P. Frye*, sailing from Seattle to Queenstown with a cargo of wheat, was captured by a German cruiser and sunk at sea. The United States protested on the ground that the destruction of the *Frye* was in

[1] Art. 61, 62.

[2] See the dicta of the court in the cases of the *Acteon* and the *Felicity*, 2 Dodson, 48, 381 (1815, 1819), both enemy vessels. Scott, *Cases*, 780, 783.

[3] Hurst and Bray, *Russian and Japanese Prize Cases*, I, 54. Scott, *Cases*, 793.

[4] Compare *U. S. Naval War Code*, 1900, Art. L. Also *Instructions Governing Maritime Warfare*, 1917, No. 96.

[5] Art. 49.

[6] Art. 50-54.

CHAP. XXXII

violation of the treaties of 1799 and 1828. Germany contested the interpretation of the treaties, and further defended the capture on the ground that the cargo, being destined to fortified ports, was conditional contraband.[1] In its controversy with Holland over the sinking of the *Maria* and the *Medea*, Dutch vessels carrying conditional contraband, the German Government relied upon the provisions of the Declaration of London as corresponding "in substance with the generally recognized principles of international law,"[2] although not formally ratified.[3]

h. Prize courts

The determination of the legality of the capture by a belligerent of enemy or neutral merchant vessels and of their liability to confiscation rests with the prize courts of the belligerent state. These courts are domestic tribunals, organized and exercising their functions in accordance with the provisions of national legislation. But although the authority and jurisdiction of prize courts is derived from national law, the rules which they apply to the cases coming before them are the rules of international law, except in so far as special national legislation may have prescribed a particular interpretation of these rules.[4] As a matter of fact, national legislation has frequently intervened to direct the judgment of prize courts, and their decisions must be discounted to that extent when cited as evidence of international law.

Since it is a violation of neutrality for a belligerent to set up a prize court in the ports of a neutral state, the decision of such a court would not be accepted by third states as passing title to the condemned property. In the case of the *Flad Oyen*[5] the British High Court of Admiralty refused to recognize the title of a Danish purchaser who had bought a ship condemned as prize by the French consul in the neutral port of Bergen.

Owing to the numerous controversies between belligerents and neutral states arising from the diverse interpretation of interna-

[1] *Am. White Book*, II, 185 ff., III, 311 ff.
[2] See above, p. 537.
[3] See Garner, *op. cit.*, II, 271.
[4] The classic statement of the functions of prize courts is that given in the case of the *Maria*, 1 C. Rob., 340 (above, p. 550): "I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me;—namely, to consider myself as stationed here not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality."
[5] 1 C. Rob., 135 (1799). Scott, *Cases*, 1070; Evans, 606.

The International Prize Court of 1907

tional law by belligerent prize courts, as well as from contested points of fact, proposals were made from time to time looking to the creation in time of war of prize courts upon which neutral states as well as both belligerents would be represented.[1] These efforts culminated in the adoption by the Second Hague Conference of the Convention (XII) relative to the Establishment of an International Prize Court, based chiefly upon German and British drafts presented to the conference. The convention, although not signed by all the powers, and not ratified by any, is of sufficient importance as a constructive proposal to merit study. It provided that, while national courts should continue to exercise original jurisdiction over prize cases, an appeal might be taken in all cases involving the property of neutrals and in certain cases involving enemy property.[2] This appeal might be brought by a neutral power, by a neutral individual, or by an enemy individual according to the conditions laid down.[3] The law to be applied by the court was, in the absence of treaty provisions, to be "the rules of international law." If no generally recognized rule existed, the court was to give judgment "in accordance with the general principles of justice and equity."[4] It was the uncertainty attaching to the law to be applied by the court that led to the calling of the London Naval Conference and the formulation of the Declaration of London as a definite code of naval warfare.[5]

Composition of the court

The composition of the court was the result of a compromise between the claim of the smaller states to equal representation and the obvious impossibility of a court representing the entire body of states. Judges and deputy judges were to be appointed by each state, and from among these a court of fifteen judges was to be set up, eight of whom, representing the Great Powers, were to be permanent members. The other seven were to be occasional members sitting by rotation according to a table annexed to the convention, which gave a longer or shorter term to the lesser states according to the rank assigned to them.[6] This practical denial of the principle of the equality of states led to the refusal of a number of states, notably Brazil, to sign the convention, while eleven other states signed with reservation of the offending article. Ratification of the convention was delayed pending a more definite understanding as to the law to be applied by the court.[7]

[1] For details, see Oppenheim, *International Law*, II, 559 ff.
[2] Art. 1, 2, 3.
[3] Art. 4.
[4] Art. 7
[5] See above, p. 29.
[6] Art. 10, 14, 15.
[7] See above, p. 537.

CHAPTER XXXIII

NEUTRAL DUTIES

a. Duty of abstention

As has been pointed out above, neutral duties represent the conduct which it is the right of the belligerent to demand of a neutral state as the condition of its neutrality. These duties may, for convenience of legal treatment, be divided into two groups.[1] The first and less important of these groups includes the negative or passive duties deducible from the general obligation of the neutral state to abstain from participation in the war. Direct participation under treaty obligation, such as was possible in the eighteenth century, is now out of the question. Indirect participation by the grant to one belligerent of privileges which are not accorded to the other, such as was provided for in the treaty of 1778 between the United States and France,[2] is likewise no longer compatible with neutrality. Moreover, abstention by the neutral state from participation in a war is something more than the mere impartial treatment of the contending parties. As Vattel pointed out, "the same number of troops, the same quantity of arms, munitions, etc., furnished under different circumstances, do not amount to equivalent help." [3]

Commercial relations between neutral and belligerent states

Not only does the duty of abstention forbid a neutral state to participate directly or indirectly in the conduct of hostilities, but it prescribes that the state may not in its corporate capacity maintain certain commercial relations with a belligerent which would have the effect of furnishing him with the sinews of war. What individual citizens of the neutral state may do is another question;[4] the state itself, acting through its government, must forego such transactions as lending money to the belligerents,[5] guaranteeing a

[1] There is no standard classification adopted by either customary or conventional law. The Hague Conventions merely distinguish between neutral rights and duties in war on land and in maritime war. Treaties and texts vary widely in their method of handling the subject.

[2] Malloy, *Treaties*, I, 468. [3] *Droit des Gens*, III, § 104. [4] See below, p. 565.

[5] Vattel thought it no offense to lend money to one belligerent rather than to the other "so long as it appears that the nation is lending its money solely for the purpose of obtaining interest," believing that it can get better security from one belligerent than from the other. *Droit des Gens*, Bk. III, § 110. But the United States refused to make a loan to France in 1798 on the ground that it would be a violation of neutrality.

belligerent loan floated in the neutral country, selling military supplies to the belligerent, etc.—all unobjectionable in time of peace. During the Franco-Prussian War the United States sold surplus supplies of munitions which, being bought by French agents in the open market, went to the use of the French armies.[1] The sales were subsequently defended on the ground that they had been begun before the outbreak of war; but the present conception of neutral obligation is better expressed by the Thirteenth Hague Convention, which provides that "the supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden."[2]

Acts of courtesy

The obligation of complete abstention from participation in the war does not, however, prevent a neutral state from continuing to exhibit toward the belligerents certain acts of friendliness, such as the furnishing of warships with limited supplies of food and coal, which involve a measure of indirect help to the belligerent and may, under the circumstances, benefit one belligerent more than the other. The line between such permissible acts of courtesy and other forbidden acts has not been determined upon principle, but has been worked out synthetically by the practice of states. The Thirteenth Hague Convention adopted specific rules on the subject which put an end to some, if not all, of the controversial issues.[3] But whether the conduct of the neutral in this matter be guided by customary or by conventional law, the strictest impartiality must be shown in extending the same privileges to both belligerents.[4]

b. Duties of prevention

In addition to its negative or passive duties of abstention, a neutral state is held to certain positive or active duties of prevention. It is not sufficient for the neutral state to refrain from giving help to either belligerent by any act of its own; it must go farther and prevent any use of its territory by either of the belligerents, or by persons acting in their interest, which would give one of them an advantage over the other. The legal basis of these duties of prevention is the sovereign right of the neutral state over the territory subject to its jurisdiction. If belligerents may not violate

[1] See Moore, *Digest*, VII, § 1309.

[2] Art. 6, Convention respecting the Rights and Duties of Neutral Powers in Maritime War.

[3] See below, p. 557.

[4] The subject is treated below under the heading of "Duties of Prevention," because of the fact that controversies as to the observance of neutral duty in this respect have turned upon the failure of the neutral to take active steps to prevent the abuse of its hospitality.

the neutrality of a state by committing acts of hostility within its territory,[1] no more may a neutral state acquiesce in such acts without giving ground of complaint to the injured party.

Acts of the belligerents themselves

With respect to acts of hostility committed by the belligerents themselves within neutral territory, the neutral may not always be able to prevent the actual commission of the offense, but it can at least make such redress to the injured belligerent as it is able on its part to exact from the offending belligerent. The obligation imposed by the Hague convention that "a neutral power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory"[2] obviously does not impose an obligation beyond the physical powers of the neutral. A small state is, therefore, not called upon to intervene forcibly between the contending belligerents.[3] The non-resistance of Luxemburg to the German armies in 1914 was not an offense on its part. Nevertheless, the neutral must do what it can to make redress. If a capture has been made in its territorial waters, as in the case of the *Florida*,[4] the neutral must demand restoration, and if this cannot be effected the neutral must make compensation to the injured belligerent. In the case of the *General Armstrong*, an American privateer attacked by a British cruiser in Portuguese waters, the United States demanded redress of Portugal for its failure to protect the vessel, although the claim was disallowed by the arbitrator on the ground that the vessel had not asked protection from the Portuguese authorities.[5] The Thirteenth Hague Convention confirms customary law in requiring that if a prize has been captured in neutral waters, and is still within the neutral jurisdiction, the neutral must use the means at its disposal to release the prize with its officers and crew and to intern the prize crew.[6]

Measures short of actual hostilities

Belligerent measures short of the actual commission of hostilities must be checked by the neutral state as soon as it has become aware of them. In war on land the neutral must prevent the passage across its territory of belligerent troops or convoys of

[1] See above, p. 524.

[2] Art. 5, Convention respecting the Rights and Duties of Neutral Powers and Persons in War on Land.

[3] The use of force is, however, justified as a matter of neutral *right*, if the neutral state feels that it can safely have recourse to it. See above, p. 524. Neutral duty does not call for any further risk on the part of the neutral.

[4] See above, p. 524.

[5] Moore, *International Arbitrations*, II, 1071; *Digest*, II, § 210.

[6] Art. 3.

supplies.[1] If belligerent armies are allowed to take refuge on its soil, the neutral must intern them so as to prevent their escape.[2] A special duty of humanity, as distinct from neutrality, is imposed on the neutral state by the Hague convention to supply interned troops with food and clothing.[3] A like duty is imposed with respect to the wounded and sick of either belligerent interned on neutral territory.[4] In maritime warfare similar obligations arise. Neutral states must prevent belligerents from setting up prize courts within their territory; they must prevent belligerents from using their ports and waters as a base of naval operations against their enemy, or from erecting wireless telegraph stations or any apparatus for the purpose of communicating with belligerent forces on land or sea.[5] It should be observed, however, that the mere passage of a belligerent vessel through neutral territorial waters does not constitute an offense against neutral rights or raise a question of neutral duty.[6]

c. Permissible use of neutral ports

In the case of the above acts the prohibition is absolute; the neutral must allow them under no circumstances. There are, however, as has been seen, certain courtesies which a neutral may show to belligerents with respect to the use of its ports by belligerent ships of war. These courtesies may, on occasion, actually amount to aid to the belligerent in the conduct of hostilities; but the aid is in these cases regarded as incidental and raises no question of the obligations of neutrality. All that the neutral is called upon to do is to apply impartially to both belligerents the conditions and restrictions imposed by customary and conventional law.[7]

Restrictions imposed: stay in port

Practice has varied considerably with respect to these conditions and restrictions. The Thirteenth Hague Convention attempted the formulation of definite rules, and its provisions represent with respect to the points of contention a compromise between the states, notably Great Britain, possessing naval stations in all parts of the world and other states, notably Germany, having

[1] Art. 2, 5, Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in War on Land, confirm the customary rule.

[2] Art. 10, *ibid.*, confirms the customary rule.

[3] Art. 12.

[4] Art. 15.

[5] Art. 5, Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval Warfare. The *duty* is stated in terms of a prohibition to belligerents against the violation of neutral rights. See above, p. 526. The same is true of several other duties laid down by the same convention.

[6] Art. 10.

[7] Art. 9.

fewer or no ports. It is provided that, in default of special legislation of the neutral state to the contrary, the stay of belligerent warships in neutral waters is to be limited to twenty-four hours.[1] Earlier practice tended to accept the twenty-four-hour limit as unconditional.[2] Vessels in neutral waters at the outbreak of hostilities must be notified to depart within the twenty-four-hour or other prescribed period.[3] Further, in default of special legislation of the neutral state to the contrary, no more than three warships of the same belligerent may be present simultaneously in the neutral port.[4]

Departure from port

An older rule, dating from treaties of the eighteenth century,[5] reappears in the provision that, when warships of both the belligerents are present in neutral ports, a period of twenty-four hours must elapse between the departure of the ships of the respective powers, the order of departure being determined by the order of arrival. In like manner a merchant vessel of one belligerent must be given a twenty-four-hour start over a warship of the enemy.[6]

Repairs

The repairs which belligerent warships may make in neutral ports are limited to such as are "absolutely necessary to render them seaworthy" without adding in any manner to their fighting force.[7]

Food and fuel

With respect to the supplies that may be taken on by belligerent warships in neutral ports, while any increase of war material or armament is denied them, they may revictual to the extent of bringing up their food stores to the peace standard.[8] No adjustment of the conflicting views as to the quantity of fuel that might be shipped was reached, with the result that an option is left to the neutral state either to permit belligerent ships to take only so much as is necessary to enable them to reach the nearest port of their own country, or on the other hand to allow them to fill up their bunkers built to carry fuel. In both cases, however, the belligerent warship must not be allowed to replenish its supply of fuel in a port of the same neutral power within the succeeding three months.[9]

Internment of prize-ships

The Hague Convention further provides that prize ships may be brought into a neutral port only on account of unseaworthiness,

[1] Art. 12.

[2] For the origin of the rule in the British orders of January 31, 1862, see Hall, *International Law*, § 231.

[3] Art. 13. [4] Art. 15.

[5] See Hall, *International* Law, § 231.

[6] Art. 16. [7] Art. 17. [8] Art. 18, 19. [9] Art. 19, 20.

stress of weather, or want of fuel or provisions, and must leave as soon as the circumstances which justified their entry are at an end.[1] If brought into port under other circumstances, the neutral power must effect their release, but an exception is made by which the neutral may permit prizes to enter its ports if they are to be sequestered pending the decision of a prize court.[2] In like manner, belligerent warships which fail to leave a neutral port in which they are not entitled to remain must be interned by the neutral state, together with their officers and crew.[3] Finally, the convention calls upon the neutral state "to exercise such surveillance as the means at its disposal allow" to prevent any violation of the provisions of the above articles occurring in its territorial waters.[4]

d. Status of armed merchant ships

During the World War the question was early presented whether armed merchant ships of the belligerents were to be regarded as ships of war, and therefore subjected to the rules governing the admission of the latter into neutral ports, or were to be regarded as mere vessels of commerce and be allowed to enjoy the traditional privileges of such vessels in respect to stay in port and the shipment of supplies. The case was not covered by the provisions of the Hague convention, and customary law was confronted with changed conditions. On September 19, 1914, the United States Department of State issued a circular in which it was announced that a distinction would be made between belligerent merchant vessels armed for offense and those armed for defense, and that the basis of the distinction would be the number, size, and position of the guns, and other factors indicating the intention with which the armament of the vessel was to be used. The burden of proof was put upon the belligerent to show a defensive purpose.[5] In reply Germany urged that armed merchant vessels were unlawful combatants[6] and as such might properly be excluded from neutral ports, but that in any case they should not be accorded greater privileges than ships of war.[7]

In consequence of the offensive campaign subsequently carried on by British armed merchant vessels against the German submarine,[8] the United States Government recognized the impractical

[1] Art. 21.

[2] Art. 22, 23. In signing the convention the United States, Great Britain, and other states made reservation of this article, which amounted to an announcement that they would not avail themselves of the permissive feature of the rule.

[3] Art. 24. [4] Art. 25. [5] *Am. White Book*, II, 43.

[6] See above, p. 497. [7] *Am. White Book*, II, 45. [8] See above, p. 514.

CHAP. XXXIII

character of the policy of September, 1914, and made an informal proposal to Great Britain that an agreement should be reached between the belligerents, by which, on the one hand, belligerent merchant vessels should be prevented from carrying any armament whatever, and, on the other hand, submarines should be made to adhere strictly to the traditional rules with respect to the attack upon merchant vessels.[1] This proposal was superseded on March 25, 1916, by new rules which abandoned the earlier test of the size and character of the vessel's armament as determining *offensive* intent, and prescribed that the question of intent should be judged by the commission or orders which the vessel carried from its government, or by its past conduct. In the absence of such a commission the armed merchant vessel was to be permitted to enjoy the same hospitality in neutral ports as was shown to unarmed belligerent vessels.[2]

e. Acts of individuals in violation of neutrality

Not only is the neutral state under a duty to prevent the armed forces of the belligerents from making an improper use of its territory, but it must also prevent individual persons, whether acting as agents of a particular belligerent or influenced by commercial motives, from violating its sovereignty in the interest of one or other of the belligerents. Here the neutral state is in a more effective position with respect to the prevention of the illegal act. By the exercise of reasonable diligence it can check the act in its very inception, or in any case it can use its military force to defeat the project as soon as it has been discovered. Where the forbidden acts are performed by official agents of the belligerent, the neutral state can do no more than prevent the commission of the act, and, as in the case of Citizen Genêt in 1793,[3] call upon the belligerent state to withdraw its officer and make redress for his attempted violation of neutral territory. On the other hand, where the conduct of private individuals is concerned, the neutral state is free to apply the full force of its domestic law to punish the wrongful act.

What is the scope of the duty of a neutral state with respect to the prevention of violations of its sovereignty by individual

[1] *Am. White Book*, III, 162. See above, p. 514.

[2] *Ibid.*, III, 188 ff. For an argument against the validity of this position, see Hyde, *International Law*, II. § 743. For a favorable comment, see Garner, *International Law and the World War*, I, Chap. XVI. The Netherland Government held consistently to the position that armed merchant ships were "assimilated to belligerent warships" and were not to be admitted into Dutch ports. See *Am. Journal*, XII (1918), Supp. 235, 238.

[3] See Moore, *Digest*, II, 446; IV, 485.

persons? Custom and convention have combined to draw a fairly clear line between acts which a neutral state is not obligated to prevent, although they are incidentally helpful to one belligerent as against the other, and other acts which amount to direct military aid and would therefore compromise the neutrality of the state if not prevented. The logic of the classification may be open to question, and as a matter of fact sharp international controversies have taken place to determine upon which side of the line a particular act should be placed.[1] But accepting certain acts as now clearly within the forbidden class, the neutral state is called upon to use the means at its disposal to prevent them. In some states the ordinary criminal laws of the state appear to furnish an adequate basis for action against the offending individuals; in other states, as in the United States and Great Britain, special laws have been enacted to enable the state to meet more effectively the obligations imposed upon it.

Scope of neutral duty in this field

Legislation of the latter character, enacted by the neutral state to prevent individuals within its jurisdiction from compromising the neutrality of the state, is known in the United States as a "neutrality act," and its particular provisions are called "neutrality laws."[2] Neutrality laws are thus purely domestic regulations and form, as such, no part of the body of international law.[3] Being enacted by the state for the better observance of its international obligations, they may be looked upon as embodying in part the conception held by the individual state of what the rules of international law require in the matter. But since, from motives of policy, a state may choose to impose additional restrictions upon its citizens beyond the requirements of international law, such excess of legislation does not increase the obligations of the neutral state, just as the failure of a state to adopt adequate legislation does not release it from responsibility for acts committed within its jurisdiction by which its neutrality is compromised. The Neutrality Acts passed by the United States in 1794 and 1818 went considerably in advance of the obligations of neutrality recognized by

f. Neutrality laws

[1] E.g., the controversy between the United States and Great Britain over the fitting out and arming of the *Alabama*. See below, p. 564.

[2] The term "Foreign Enlistment Act" is used in Great Britain, owing to the fact that the first British act, of 1819, was based to some extent upon earlier British acts for the prevention of the enlistment of British subjects in foreign armies.

[3] It is important to observe the distinction between "neutrality laws" and the international "law (or laws) of neutrality." The latter term covers the whole field of the relations between belligerents and neutrals.

CHAP. XXXIII

international custom of that period. Again, the existing act of 1818, with its subsequent amendments, fell short of the obligations as understood in 1914. In neither case were the obligations of the United States in point of international law increased or diminished.[1]

Accepting a commission

Among the acts which a neutral state must not allow to be committed upon its soil is the grant or acceptance of a commission to serve in the forces of a belligerent state. The belligerent which should attempt through its agent to grant such commissions would be acting in violation of the sovereignty of the neutral state, and the latter would in consequence be obligated to prevent the act, even though, by reason of the offender's official position, it could not punish him.[2] The Neutrality Laws of the United States penalize the act of a citizen who, within the territory or jurisdiction of the United States, "accepts and exercises a commission" to serve a foreign prince or state.[3] In 1797 one Isaac Williams was convicted for accepting a commission under the French Republic and under its authority committing acts of hostility against Great Britain.[4] Present international law would seem to go further and to require the neutral to prevent, where possible, the mere acceptance of a commission, apart from its exercise.

Enlisting recruits

Moreover, the neutral state must prevent a belligerent from setting up a recruiting-office upon neutral territory, such an action being, like the granting of a commission, a violation of neutral sovereignty. The Fifth Hague Convention embodies existing custom in providing that "corps of combatants can not be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents."[5] The Neutrality Laws of the United States reflect the obligations of international law in penalizing the act of enlisting, or hiring another to enlist or to leave the jurisdiction of the United States with intent to enlist, whether as soldier or seaman in the service of a belligerent state.[6] The

[1] Upon this general subject, see Fenwick, *Neutrality Laws of the United States*, Chap. I, II.

[2] The statement of Jefferson in a letter to the French minister Genêt, June 5, 1793, has become almost classic: "That it is the *right* of every nation to prohibit acts of sovereignty from being exercised by any other within its limits, and the *duty* of a neutral nation to prohibit such as would injure one of the warring Powers. *Am. State Papers, For. Rel.*, I, 150. Cited in Fenwick, *Neutrality Laws*, 19.

[3] *Criminal Code*, § 9. *Rev. Stat.*, § 5281.

[4] The defendant's plea that he had expatriated himself was overruled. See above, p. 169.

[5] Art. 4, Convention respecting the Rights and Duties of Neutral Powers and Persons in War on Land.

[6] *Criminal Code*, § 10; *Rev. Stat.*, § 5282.

provisions making exception in favor of subjects of a belligerent state who happen to be transiently in the United States and who enlist on board a vessel of war or privateer in the ports of the United States,[1] falls short of the present obligations of neutrality, although the penal laws could not in any case be executed upon the deck of a foreign warship. The Thirteenth Hague Convention expressly prohibits belligerent warships from making use of neutral ports for "completing their crews."[2]

Leaving territory with intent to enlist abroad

But while the neutral state must prevent enlistments upon its soil, it is not under obligation to prevent individual persons, whether its own citizens or others, from leaving its territory with the intention of enlisting in the service of the belligerent when they have arrived abroad. This absence of obligation, based, it would seem, upon the practical impossibility on the part of the neutral of preventing the departure of such persons, is confirmed by the Fifth Hague Convention in the provision that "the responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents."[3] It would also appear that a neutral is not under obligation to prevent subjects of a belligerent from passing through its territory on their way to their mother-country with intent to enter service, provided such persons, reservists or others, "travel as individuals and not as organized, uniformed, or armed bodies."[4]

Hostile expeditions from neutral ports

Customary law has long recognized the general principle that a neutral state must not permit its territory to be used as a starting-point for hostile expeditions in the interest of the enemy. Such an expedition would be clearly in violation of the sovereignty of the neutral state, and in this case, as in others, the right of the neutral state to resist and its duty to prevent are correlative. The question as to what constitutes a hostile expedition has, however, given rise to controversy. In 1793, and again in 1818, the United States Government was chiefly concerned with preventing the fitting out and arming of privateers, which, when equipped with a commission, were to engage in the service of one belligerent to make depredations upon the commerce of the other.[5] The

[1] *Criminal Code*, § 18; *Rev. Stat.*, § 5291.

[2] Art. 18, Convention concerning the Rights and Duties of Neutral Powers in Naval War.

[3] Art. 6.

[4] See Secretary Bryan's letter to the chairman of the Senate Committee on Foreign Affairs, January 20, 1915. *Am. White Book*, II, 58, 62.

[5] See § 3, Neutrality Act of 1794. *Criminal Code*, § 11; *Rev. Stat.*, § 5283.

Sale of neutral vessels

belligerent status of these vessels was beyond dispute. On the other hand, there appeared to be no reason for preventing a citizen who owned a merchant vessel from arming and otherwise equipping it and selling it in the neutral port or sending it abroad for sale to one or other of the belligerents.[1] Such a vessel might be contraband of war, and subject to capture on the high seas, but it was not in itself the equivalent of a hostile expedition. Again, it was not thought necessary to prevent citizens or others from building a vessel to the order of a belligerent in a neutral port without any intent on their part other than to reap the profits of the industry in which they were engaged.

New conventional rules

By 1861 conditions had changed. Confederate cruisers, notably the *Alabama,* built to order in British ports and armed after their departure from port, inflicted such heavy losses upon the commerce of the United States that it was seen that the commercial intent of the builders was no excuse for the neutral state in the eyes of the injured belligerent. The United States pressed a claim upon Great Britain for damages. Arbitration was resorted to, and in view of the dispute as to the question of law involved, it was agreed beforehand, in the Treaty of Washington of 1871, that a neutral state was bound "to use due diligence" to prevent the fitting out, arming, or equipping within its jurisdiction of "any vessel" which it had reasonable ground to believe was intended to carry on war against a power with which it was at peace.[2] This newly formulated rule was in keeping with the fact that vessels of war, even though unarmed at the time of leaving port, had developed such potentialities of inflicting injury upon an enemy as to be equivalent to a hostile expedition in themselves. At the Second Hague Conference the rule was adopted in substance in the convention concerning neutral rights and duties, with the change, however, that the somewhat indefinite phrase "due diligence" was replaced by the phrase, "a neutral government is bound to employ the means at its disposal" to prevent the acts in question.[3] The rule of 1871, as well as that of 1907, would appear by inference to require a neutral state to prohibit the sale and transfer within

[1] See the decision of the Supreme Court of the United States in the case of the *Santissima Trinidad,* 7 Wheaton, 283 (1827). Scott, *Cases,* 823; Evans, 788.

[2] For the text of the "Three Rules of the Treaty of Washington," see Moore, *Digest,* VII, § 1330; Malloy, *Treaties,* I, 703. For a study of the *Alabama* controversy, see *Papers Relating to the Treaty of Washington.* Moore, *International Arbitrations,* I, 495 ff.

[3] Art. 8.

its ports to a belligerent of all vessels, whether actually armed or not, which are capable of being converted into warships or used as auxiliaries in the belligerent navy.

Corps of combatants

A second form of hostile expedition which a neutral state must prevent from departing from its territory is an organized body of armed combatants. Whether the expedition has planned to depart across the land boundary or from one of the ports of the neutral state is a point of no consequence. It would appear to be essential, however, to constitute a military expedition that the body of men be under the command of officers, that they have a common hostile intent, and that they be armed. Such at least has been the application given to the Neutrality Laws of the United States.[1] The provisions of the Fifth Hague Convention state that "corps of combatants cannot be formed nor recruiting offices opened on the territory of a neutral Power to assist the belligerents."[2] The phrase "corps of combatants" is somewhat indefinite and might or might not be held to include the equipment of arms. In 1870 the United States did not feel called upon to prevent the departure from its territory of a large body of Frenchmen who took passage upon two French steamers, the men not being organized and the arms and ammunition which were shipped at the same time not being in their personal possession.[3] On the other hand, Great Britain in 1829 prevented the landing at Terceira of a party of Portuguese soldiers who had left England unarmed, but so organized as to be capable of immediate action as soon as their arms were delivered to them.[4]

g. Permissible acts of individuals

Apart from acts falling within the above two classes neutral states are not obligated to prevent their citizens or other persons within their territory from maintaining relations with the belligerents whether directly through their agents or indirectly through private business firms located in belligerent territory.[5] International custom has long given sanction to a distinction in this re-

[1] See United States *v.* Hart, 74 Fed. Rep., 724; United States *v.* Wiborg, 163 U. S., 632 (1896).

[2] Art. 4.

[3] See Hall, *International Law*, § 222.

[4] *Ibid.*

[5] It should be noted that neutral responsibility is limited to acts committed upon the territory of the neutral state. Acts of a directly hostile character, such as entering a neutral merchant vessel in the service of a belligerent or fighting in the ranks of a belligerent, may be committed by its citizens outside the jurisdiction of the neutral state without raising any question of responsibility. The fact that a state may for domestic reasons choose to punish such acts of its citizens does not imply an obligation to do so at international law.

CHAP. XXXIII

spect between acts of the state in its corporate capacity as a sovereign power and acts of individual citizens of the state undertaken upon their own initiative. Acts which the state itself may not commit without compromising its neutrality may be freely committed by its citizens or others within its territory. The line between the permissible activities of individuals and other activities, described above, which the neutral state is called upon to prevent represents a compromise between neutrals and belligerents which, while it may be criticized in point of logic and expediency, has been fairly clearly defined by custom.

Expressions of opinion

Neutral states are under no obligation to prevent individuals from giving expression to opinions or criticisms unfavorable to one or other of the belligerents or favorable to insurgents in revolt against a *de jure* government. On several occasions the United States has refused to take action, as, for example, at the request of Great Britain in 1866 with respect to the agitation of Fenians,[1] to suppress propaganda directed against a friendly government. In consequence the appeal of President Wilson to the American people, issued shortly after the neutrality proclamations of 1914, to be "impartial in thought as well as in action," and to put a curb upon "sentiments" as well as upon "every transaction that might be construed as a preference of one party to the struggle before another"[2] was in excess of the requirements of international law, whether or not justifiable as a matter of domestic policy.

Loans to belligerents

Nor is the neutral state called upon to prevent individuals from making loans of money to either of the belligerents upon such terms as may be agreed upon between the parties. Certain continental publicists have condemned the practice,[3] but international practice sanctions it. The same is true of voluntary subscriptions made by neutral citizens to a belligerent state.[4] On the other hand, neutral governments may, as a matter of policy, forbid or discourage such loans, either directly by penal legislation, or indirectly by refusing to lend their aid to secure the payment of the debt. In 1824, in the case of De Wutz *v.* Hendricks[5] a British court of com-

[1] See Moore, *Digest*, VII, § 1313.

[2] Under date of August 18, 1914. *Am. White Book*, II, 17.

[3] Notably Bluntschli, *Das Moderne Völkerrecht*, § 768.

[4] In 1823 the law officers of the British crown advised against the legality of "subscriptions" while admitting the legality of "loans"; but their opinion was not adopted as a rule of conduct by their government. Scott, *Cases*, 900, n., quoting Phillimore.

[5] 2 Bing., 314. Scott, *Cases*, 892.

mon pleas held that a contract in connection with a proposed loan to the Greek insurrectionists in their war with Turkey was contrary to international law; and a similar decision was rendered by the Supreme Court of the United States in 1852 in the case of Kennett *v.* Chambers [1] which involved a loan to a Texan general in 1836 before Texas had been recognized as an independent state. In September, 1914, the United States Department of State announced that loans by American bankers to belligerents were "inconsistent with the true spirit of neutrality." At the beginning of the World War President Wilson expressed a wish that loans of money should not be made to the belligerents, the reason, as subsequently asserted, being that they were "inconsistent with the spirit of neutrality"; [2] but no attempt was made to prevent them, and the attitude of the government appears to have been based upon expediency rather than upon international law.

Sale of munitions of war

A more difficult problem is presented by the sale of munitions of war by neutral citizens to the belligerents. The traditional rule upon this subject represents, as in other cases, a compromise between neutrals and belligerents. On the one hand, neutral states have been unwilling to restrict the ordinary commercial relations of their citizens with the belligerents, partly from inability to control their conduct, and partly from unwillingness to impose undue burdens upon them. On the other hand, the belligerents are recognized by the neutral state as having the right to put a check upon such commerce by the confiscation of contraband goods captured on their way to the enemy state and by the establishment of effective blockades.[3] It is a matter of no consequence from the point of view of international law whether the contracts for such sales be made in neutral or belligerent territory, or whether delivery of the munitions be made in neutral or in belligerent

[1] 14 Howard, 38. *Ibid.*, 893; Evans, 794.

[2] *Am. White Book*, II, 57, 61.

[3] Jefferson's reply to Great Britain and France in 1793 has been widely quoted: "We have answered that our citizens have always been free to make, vend, and export arms; that it is the constant occupation and livelihood of some of them. To suppress their callings, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, has not required from them such an internal derangement in their occupations. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of any of the belligerent Powers on their way to the ports of their enemies." *Am. State Papers, For. Rel.*, I, 147.

CHAP. XXXIII

merchant vessels.[1] The question has arisen, however, whether an exception to the general rule should not be made when belligerent merchant vessels carry on in neutral ports such an extensive trade in articles of war as to make the neutral territory directly subservient to the effective conduct of hostilities. If, it has been asserted, belligerent warships may not make neutral ports a base of operations by the frequent renewal of their supplies, was it consistent that belligerent merchant vessels should be allowed to accomplish practically the same object? In 1871 the United States argued at Geneva that Great Britain should not have permitted its neutral soil to be used by the Confederate States as "the main, if not the only, base" of their military supplies.[2] The Fifth and Thirteenth Hague conventions went no further than to lay down the general rule that "a neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet."[3]

Situation during the World War

During the World War the situation was presented in which one of the belligerent groups drew heavily upon the United States for its military supplies while the other was, by reason of the superior navy of the enemy, almost entirely cut off from them. Moreover, the trade in arms was maintained not only by the munition factories already in existence at the time the war broke out,[4] but by numerous other factories built or reconstructed to meet the unprecedented demand. Under these circumstances the German Government pointed out, on April 4, 1915, that if it was the will of the American people that there should be "a true neutrality" the United States would find means of preventing this "one-sided supply," or at least of making use of it to force Great Britain to desist from interfering with the legitimate neutral trade with Germany.[5] A similar protest was entered by the Austro-Hungarian Government on June 29, 1915, which pointed out that the arms industry had "soared to unimagined heights," and that the Thirteenth Hague Convention contemplated a change in existing law to meet new conditions.[6]

[1] Delivery cannot, of course, be made to belligerent warships while in neutral ports, for this would constitute an addition to their fighting force. See above, p. 558.

[2] *Papers Relating to the Treaty of Washington*, I, 125-6.

[3] Article 7 of the Fifth Convention is verbally identical in the French text with Article 7 of the Thirteenth Convention.

[4] Such was the situation which Jefferson had in mind in 1793. See above, p. 567, n. 3.

[5] *Am. White Book*, I, 73.

[6] *Ibid.*, II, 193.

While a number of proposals for an embargo upon arms were made in Congress, the Department of State took the position that it would not recognize an obligation to change or modify the rules of international usage to meet the special conditions which deprived the Central Powers of access to the American markets. Moreover, the United States was opposed in principle to the prohibition of the trade in arms and munitions between belligerents and neutrals, on the ground that such prohibition would put at a disadvantage the state which, from pacific motives, had neglected to obtain adequate supplies in advance of an attack upon it.[1]

[1] Note of August 12, 1915. *Am. White Book*, II, 194.

CHAPTER XXXIV

AËRIAL WARFARE

Aërial warfare had been of too recent development in 1914 to admit of the growth of a customary law upon the subject. Nor had the efforts of the states more directly concerned been successful in the formulation and adoption of a conventional law of the air. Such provisions of the conventions of the Hague Conference of 1907 as were applicable in 1914 either had not been ratified by the signatory powers or were framed too vaguely to constitute an effective regulation. There remained only the general principles of the law of war, together with analogous rules of land and maritime warfare, from which inferences might be drawn by belligerents and neutrals to meet the new conditions presented.

a. Air-ships legitimate combatants

As between the belligerents themselves, there was no question at the outbreak of the World War as to the legitimate character of air-ships as instruments of war. The earlier uses of balloons as vantage-points of observation and means of escape from besieged cities [1] were now supplemented by the aëroplane as a direct instrument of combat. Battle between enemy aëroplanes followed the rules governing battles on land or at sea. The crews of defeated planes which fell upon enemy soil obtained the usual treatment accorded to prisoners of war.

Bombardment by air-ships

But if air-ships themselves were legitimate combatants, the methods of warfare employed by them were open to controversy. How far were bombardments from the air legitimate? The Hague Conference of 1899 had adopted a declaration by which the contracting parties agreed to prohibit, for a term of five years, the launching of projectiles and explosives from balloons, "or by other new methods of similar nature." [2] The declaration was renewed in 1907, but in view of the rapid progress that had been made in the building of air-ships the declaration was not ratified, even by the limited number of signatory powers. Provision was, how-

[1] For the threat of Bismarck in 1870 to treat balloonists as spies, see Hall, *International Law*, § 188.

[2] For the text, see Higgins, *Hague Peace Conferences*, 484; *Hague Conventions*, 220.

ever, made that air-ships should, in respect to their use for purposes of bombardment, be brought under the provisions of the Hague convention relating to war on land. This was done by amending the earlier article to read: "the attack or bombardment, *by whatever means,* of towns, villages, dwellings, or buildings which are undefended is prohibited."[1]

Aërial raids

During the World War "aërial raids" were of frequent occurrence. These raids were at first justified on the part of Germany on the ground that the towns and cities against which they were directed, while "undefended" in the sense of being unfortified, were centers for the assembling and distribution of troops, and for the manufacture of munitions of war.[2] The objectives of the raids were chiefly railway terminals and munition factories. Subsequently the raids were directed against the population at large, with the object of intimidation by way of reprisal for the alleged illegal blockade of Germany. On the part of the Allied Powers the earlier raids had semi-military objects in view; but later raids, though fewer in number, were, like the German raids, directed against the population indiscriminately by way of reprisal against the German reprisals.[3]

b. Neutral territorial rights

As between belligerents and neutral states, the chief issue during the World War involved the territorial sovereignty of the neutral over the air space above the national domain. Was there a right of innocent passage for belligerent air-ships through neutral air spaces similar to the right of innocent passage through neutral territorial waters? The question had been debated before 1914,[4] but upon the outbreak of war Holland, as a neutral state, promptly announced that the use of the air space over Dutch territory would be considered a violation of its neutrality, and that resistance would be offered by it to the passage of belligerent air-ships. Consistently with this position, the Dutch Government not only fired upon belligerent air-ships invading the national air space, but was careful to intern the officers and crew of belligerent planes which were forced to descend upon Dutch territory. This interpretation of neutral rights denied an analogy between the innocent passage of belligerent warships through neutral territorial waters

[1] *Regulations,* Art. 25.

[2] See above, p. 475. This argument had been advanced before 1914, e.g., by Spaight, *Aircraft in War,* 11-21.

[3] For details of the raids and for a discussion of their legal aspects, see Garner, *op. cit.,* I, Chap. XIX.

[4] See above, p. 286.

CHAP. XXXIV

and the innocent passage of belligerent air-ships through neutral air spaces. Moreover, Holland and other neutral states refused to concede to belligerent air-ships a privilege of temporary sojourn upon neutral soil corresponding to the twenty-four-hour rule applied to belligerent warships in neutral ports. In consequence, belligerent air-ships which were forced from stress of weather or from military reasons to descend upon Dutch soil were, together with their crews, interned for the duration of the war. Denmark appears to have had a similar conception of neutral duty, whereas Norway appears to have regarded shipwrecked aviators as in the class of shipwrecked sailors not subject to detention.

Character of hydro-aëroplanes

The question was raised between the United States and Germany whether hydro-aëroplanes were to be regarded as warships, which by customary law, as well as by the provisions of the Thirteenth Hague Convention, a neutral state is bound to prevent from being fitted out or armed within its jurisdiction when intended to be put at the service of one or other of the belligerents.[1] In reply to a protest of the German Government against the delivery of hydro-aëroplanes by American builders to Great Britain and Russia, the American Government stated, January 29, 1915, that that fact that such planes were "fitted with apparatus to rise from and alight upon the sea" did not give them the character of vessels so as to bring them within the accepted rules of international law.[2] Consequently, the planes were no more than conditional contraband of war, which might be freely sold by neutral citizens to the belligerents.

c. Draft code of aërial warfare

An elaborate code of aërial warfare was prepared by a commission of jurists which met at the Hague in 1922-23 in pursuance of a resolution adopted at the Washington Conference on February 4, 1922.[3] Articles 1-10 of the proposed code deal with the classification and marks of aircraft and lay down rules which, with respect to their object, may be compared to the rules of maritime warfare in respect to national flags and the conversion of merchant ships into warships. Articles 11-12 lay down the general principle

[1] See above, p. 564.

[2] *Am. White Book*, II, 145.

[3] The code appears as Part II of the "General Report of the Commission of Jurists at the Hague." For the text, see *Am. Journal*, XVII (1923), Supp., 245. For comment, W. L. Rodgers, "The Laws of War Concerning Aviation and Radio," *ibid.*, XVII, 629; J. W. Garner, "Proposed Rules for the Regulation of Aerial Warfare," *ibid.*, XVIII (1924), 56-81, where the provisions of the code are examined in detail and controversial points critically discussed.

of the right of both neutral and belligerent states in time of war to forbid or to regulate the entrance of aircraft within their jurisdiction. Articles 13-17 parallel the rules of land and maritime warfare with respect to lawful combatants. Articles 18-29 relate to the instruments and methods of aërial warfare, special attention being given to bombardment, the rules of which follow the established rules with respect to land and naval bombardment. Bombardment as a means of intimidating the civilian population is expressly prohibited. Succeeding articles deal with the authority of a military commander over enemy and neutral aircraft, with the respective duties of belligerents toward neutrals and neutrals toward belligerents, and with visit and search, capture and condemnation.[1]

[1] The student should compare the recommendations of the jurists' report with the provisions of the Aërial Navigation Convention of 1919, above, p. 288.

CHAPTER XXXV

THE TERMINATION OF WAR

The termination of war raises a number of questions which have already received incidental treatment among topics relating to the substantive law of peace. In so far, however, as these questions present new aspects when considered in connection with the special problem of the termination of war, writers have found it convenient to assign them a separate treatment and to make them collectively a distinct branch of the law.

a. Different methods of termination

In the past practice of nations wars have terminated in three different ways: by subjugation or conquest of one of the belligerent states, by simple cessation of hostilities without definite agreement between the parties, and by formal treaty of peace. The last method has been the one most frequently resorted to; and it has become the established practice of recent times where both belligerents survive the conflict. Its use is chiefly due to the growing complexity of the rules of succession between states [1] and to the necessity of adjusting the relations of third states to the situation resulting from the settlement.

Subjugation

Subjugation consists in the conquest of one belligerent by the other, followed by the formal annexation of the territory of the defeated state and the extinction of its sovereignty and international personality.[2] Such was the method by which the war between Great Britain and the South African Republic was terminated in 1902.[3] Since international law recognizes the right of self-help as a legal remedy for the redress of wrongs, it likewise recognizes that this remedy may result in the legal annihilation of one or other of the belligerents, the decision whether such shall be the outcome of the war being left to the arbitrary will of the successful belligerent. In such cases the termination of the war is marked

[1] See above, pp. 117 ff.

[2] Some writers, e.g., Oppenheim, *International Law*, II, § 264, make a distinction between conquest and subjugation, the former being merely the temporary occupation of the enemy territory, and the latter being the extermination of the enemy by the complete annexation of his territory.

[3] In this case annexation, proclaimed in 1900, preceded the final surrender of the Boer forces in 1902. See Phillipson, *Termination of War and Treaties of Peace*, 23 ff.

by the formal decree of annexation and the actual cessation of resistance on the part of the defeated state. The termination of a civil war, in which one of the parties has enjoyed merely a *de facto* belligerent status, does not call for a decree of annexation.[1]

Simple cessation of hostilities

Prior to the nineteenth century wars frequently terminated by a simple cessation of hostilities, without the conclusion of a formal treaty of peace. In such cases the date of the termination could not be accurately fixed, but was roughly determined by extraneous facts indicating the resumption of friendly relations.[2] The question as to the ownership of property, real or personal, which had changed hands during the course of the war was settled by the application of the rule of *uti possidetis,* by which each belligerent was regarded as legally entitled to such property as was actually in its possession at the time hostilities ceased. Third states were accordingly justified in maintaining relations with former belligerents on that basis.

Unilateral termination of war

Owing to the refusal of the United States Senate to ratify the Treaty of Versailles in the form submitted to it by the executive department, the question was presented in 1920 whether the United States could, as a point of law, put an end to the state of war by its unilateral act. The resumption of hostilities by the enemy was practically out of the question, the armistice having amounted to a virtual surrender. On May 15, 1920, Congress passed a joint resolution repealing the declaration of war of April 6, 1917.[3] The resolution was, however, vetoed by the President. It is an open question, therefore, what effect this resolution would have had upon the rights subsequently claimed by the United States, and recognized by Germany, in the separate treaty of peace of August 25, 1921.

b. Treaties of peace

Formal treaties of peace, the usual method by which wars have been terminated, have as a general rule been preceded by an armistice providing for a temporary suspension of hostilities.[4] On a number of occasions armistices have been followed by agreements known as "preliminaries of peace," which are tentative treaties laying down the broad lines upon which peace is to be reëstablished and regulating the *ad interim* relations of the belligerents. These

[1] As in the case of the Southern Confederacy in 1865.

[2] For the attitude of the United States in relation to the cessation of hostilities between Spain and Peru, see Moore, *Digest,* VII, 336.

[3] Senator Knox's defense of the resolution before the Senate on May 5, 1920, is quoted by Hyde, *International Law,* II, § 905. For the text, see *Am. Journal,* XIV (1920), 419.

[4] See above, p. 487.

CHAP. XXXV

preliminaries have sometimes played the part of an armistice as well; and again, as between the Allies and Germany in 1918, what is an armistice in name may contain provisions which go much further than a mere suspension of hostilities and be in fact a preliminary treaty.[1] Both the preliminaries of peace and the definite treaty of peace have been generally accepted as binding from the date of signature in so far as questions relating to the conduct of hostilities are concerned. Ratification of the treaty has been as a rule automatic, the constitutions of most states down to the nineteenth century conceding absolute powers to the monarch, and later constitutions providing for responsible ministries which might count upon a majority of the national legislature. The refusal of the United States in 1920 to ratify the Treaty of Versailles has raised a number of delicate questions bearing upon the justice of holding Germany to the terms of a treaty signed by that state in the belief that the United States would be one of the executors of the treaty. To these questions international law in its present state can give no definite answer.[2]

Relation of the final to the preliminary treaty

It is a further question whether the terms of the definite treaty of peace must conform to the general principles laid down in the preliminaries of peace or in the armistice. Should one of the belligerents have, in consequence of the earlier agreement, placed itself in a position in which it is unable to resume hostilities, whatever be the final terms imposed upon it, the question of good faith would be involved if the final treaty exceeded in severity the promise of the preliminary treaty. Such has been the contention of Germany with respect to the Treaty of Versailles as compared with the provisions of the armistice of November 11, 1918.[3]

c. Effects of the termination of war

The general effects of the termination of war are the restoration of friendly relations between the former belligerents, the subsequent renewal of diplomatic intercourse, the revival of such treaties as have been merely suspended by the war,[4] and the change in the status of enemy aliens by the removal of such legal and other disabilities as they have been subjected to. With respect to the rights of the former belligerents to movable or immovable

[1] See above, p. 489. Compare the provisions of the protocol of August 12, 1898, between the United States and Spain.

[2] For a study of the negotiation of the Treaty of Versailles, see Hyde, *International Law*, II, §§ 917-920, and references there given.

[3] See above, p. 489. The application of the rule of good faith to treaties of peace in general has been discussed above, p. 327.

[4] See above, pp. 440 ff.

property which may temporarily have passed from the possession of one belligerent to that of the other, the terms of the treaty are the primary evidence of title. Where the terms of the treaty fail to make provision, the rule of *uti possidetis* has been applied, as in the case of the cessation of hostilities without formal agreement.[1]

As between the belligerents themselves, the stipulations of the treaty dispose of any claims to damages that might otherwise be brought by one party for losses due to the destruction of property wrought by the other party. The Hague Convention (1907) respecting the Laws and Customs of War on Land undertook to create a sanction for the observance of the convention by making belligerents who violated the regulations laid down liable, if the case demanded, to pay compensation, and also "responsible for all acts committed by persons forming part of its armed forces";[2] but this provision in its bare form cannot be regarded as creating responsibility in excess of the terms of the treaty. Acts of hostility committed subsequently to the treaty of peace, in ignorance of its conclusion, are null and void, and, where possible, compensation must be made for them as for any other illegal act.[3] It is obvious that the problems presented in former wars in consequence of the delay in transmitting notice of the termination of hostilities to remote parts of the world have now practically ceased to exist.

Jus postliminii

In order to describe the status of public or private property which has been temporarily in the possession of the enemy, and is returned to a belligerent in consequence of the terms of peace, many of the older writers adopted a rule of the Roman law known as *jus postliminii*.[4] In accordance with this rule, property transferred by the treaty of peace, as well as property reconquered by the legitimate sovereign from the enemy, regained automatically its former status. The doctrine was further extended to cover not only the revival of rights of territorial sovereignty but the revival of the laws of the original sovereign, subject, however, to such vested private rights as had been legitimately created by the temporary occupant.[5] While international law has never given formal sanction to the doctrine, the rules drawn from it have

[1] See above, p. 575.

[2] Art. 3.

[3] For an instance, see the case of the *Mentor*, 1 C. Rob., 179 (1799). Scott, *Cases*, 1097.

[4] For the origin of the rule, see Phillipson, *Termination of War*, 230 ff.

[5] See Oppenheim, *International Law*, II, §§ 279-284.

CHAP. XXXV

received more or less practical recognition in the law of state succession.[1]

Amnesty

Prior to the World War it was the custom for belligerents to insert in their treaties of peace an amnesty clause creating an immunity in relation to one belligerent for all persons who had committed wrongful acts on behalf of or in the service of the other belligerent during the course of the war. Even in the absence of treaty stipulation, an amnesty was one of the legal effects of the termination of war. The immunity granted did not, however, extend to civil suit or criminal prosecution in respect to matters not connected with the war.

Proposed trial of the German ex-kaiser

By the Treaty of Versailles a striking exception to the customary law was made in the clauses providing for the trial and punishment of the German kaiser and of individual members of the German armed forces. In the case of the kaiser, the treaty provided that he should be tried "for a supreme offense against international morality and the sanctity of treaties."[2] The offense was thus not one cognizable in accordance with the existing law. A special tribunal, appointed by the five leading powers, was to be constituted to try the accused, and was to be guided in its decision "by the highest motives of international policy."[3]

Trial of other military offenders

In the case of other offenders, the measures provided for were legal rather than political. The German Government recognized the right of the Allied and Associated Powers "to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."[4] Such persons were, if found guilty, to be sentenced to punishments laid down by law. In order to make possible these trials the German Government on its part agreed to hand over to the Allied and Associated Powers all persons accused of the acts in question.[5] In addition the German Government agreed to furnish the documents and information "necessary to insure the full knowledge of the incriminating

[1] See above, p. 117. It should be noted that the application of the rule of *postliminium* by writers to the relations between belligerents differs from its application to the personal and property rights of citizens under national law. It is a municipal, not an international, question whether when private property is recaptured it shall revert ipso facto to its former owner, whether sentences passed by a military occupant hold good upon the restoration of the legitimate sovereign, etc. See Oppenheim, *International Law*, II, § 280.

[2] Art. 227. See above, p. 216.

[3] *Ibid.* Since these "motives" could not be defined on the basis of past practice, it would have been necessary for the court first to formulate the principles by which the accused was to be judged and then to try him according to them.

[4] Art. 228.

[5] *Ibid.*

acts, the discovery of the offenders, and the just appreciation of responsibility.'' [1]

In both cases, however, the proposed trials had to be abandoned. On the one hand, the Dutch Government refused to accede to the request for the surrender of the ex-kaiser, who had already been granted asylum in that country.[2] On the other hand, the practical difficulties involved in the demand for the surrender of designated members of the German armed forces, together with the obvious legal difficulty that many of the accused persons had acted in obedience to higher authority, and the general *ex post facto* character of the provisions of the treaty, led the Allied and Associated Powers to yield subsequently to the German request that the accused persons be tried by German judicial tribunals.[3]

d. New rules of responsibility

It would appear, nevertheless, that the general principle that individual members of the armed forces shall, at the close of a war, be held personally responsible for their acts in violation of the laws of war, whether committed upon their own initiative or at the command of authority, has met with a degree of international approval and may in consequence become the basis of a new conventional rule.[4] At the Washington Conference on the Limitation of Armaments provision was made in the Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare that any person who in the service of any state should violate any of the rules laid down, ''whether or not such person is under orders of a governmental superior,'' should be deemed to have violated the laws of war and be liable to trial ''as if for an act of piracy,'' and might be brought to trial before the civil or military authorities of any power within the jurisdiction of which he might be found.[5] This agreement not only sets aside the traditional rule

[1] Art. 230. For the *Report of the Commission of Responsibilities* upon which the articles of the treaty were based, together with the dissenting reports of the American and Japanese members, see *Violation of the Laws and Customs of War*, 1919.

[2] See above, p. 217.

[3] See ''German War Trials: Report of Proceedings before the Supreme Court in Leipzig,'' *Am. Journal*, XVI (1922), 628.

[4] For a discussion of the general question of the trial of war crimes as an incident to the termination of war, see Garner, *International Law and the World War*, II, §§ 581 ff.; H. H. L. Bellot, ''War Crimes: Their Prevention and Punishment,'' *Proceedings of the Grotius Society*, II, 31; J. S. Reeves, ''International Criminal Jurisdiction,'' *Proceedings*, Am. Society of Int. Law, 1921, 62; *ibid.*, 1922, 69. The question of domestic law is discussed by G. A. Finch, ''Jurisdiction of Local Courts to Try Enemy Persons for War Crimes,'' *Am. Journal*, XIV (1920), 218.

[5] For the text of the treaty, see *Am. Journal*, XVI (1922), Supp., 59.

of amnesty, but introduces a wholly new rule in respect to the responsibility of states for acts of their public officers.[1]

In addition to the action taken by the Washington Conference, attention should be called to the second resolution taken by the committee of jurists which met at the Hague in June-July, 1920, to prepare a draft project of the Permanent Court of International Justice. The resolution proposed that a new "High Court of International Justice" should be established competent to try crimes constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or by the Council of the League of Nations. The court was to have the power "to define the nature of the crime, to fix the penalty, and to prescribe the appropriate means of carrying out the judgment." The proposal was, however, rejected by the committee to which it was referred by the Assembly of the League of Nations.

[1] For a discussion of the action taken by the conference, see R. F. Roxburgh, "Submarines at the Washington Conference," *British Year Book of International Law*, 1922-23, pp. 150 ff. Also G. A. Finch, "Superior Orders and War Crimes," *Am. Journal*, XV (1921), 440. The new principle overrules *U. S. Rules of Land Warfare*, No. 366.

APPENDIX A.

COVENANT OF THE LEAGUE OF NATIONS [1]

THE HIGH CONTRACTING PARTIES

In order to promote international coöperation and to achieve international peace and security

by the acceptance of obligations not to resort to war,

by the prescription of open, just and honorable relations between nations,

by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and

by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, Agree to this Covenant of the League of Nations.

ARTICLE 1.

The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant, and also such of those other States named in the Annex as shall accede without reservation to this Covenant. Such accessions shall be effected by a declaration deposited with the Secretariat within two months of the coming into force of the Covenant. Notice thereof shall be sent to all other Members of the League.

Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guaranties of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.

Any member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

ARTICLE 2.

The action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat.

ARTICLE 3.

The Assembly shall consist of Representatives of the Members of the League.

The Assembly shall meet at stated intervals and from time to time, as occasion may require, at the Seat of the League, or at such other place as may be decided upon.

[1] The text is that submitted to the Senate of the United States on July 10, 1919. Senate Document No. 49, 66th Congress, 1st Session, 8-17.

The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

At meetings of the Assembly each Member of the League shall have one one vote and may have not more than three Representatives.

ARTICLE 4.

The Council shall consist of Representatives of the Principal Allied and Associated Powers [United States of America, the British Empire, France, Italy and Japan], together with Representatives of four[1] other Members of the League. These four Members of the League shall be selected by the Assembly from time to time in its discretion. Until the appointment of the Representatives of the four Members of the League first selected by the Assembly, Representatives of Belgium, Brazil, Greece and Spain shall be Members of the Council.

With the approval of the majority of the Assembly, the Council may name additional Members of the League, whose Representatives shall always be Members of the Council; the Council with like approval may increase the number of Members of the League to be selected by the Assembly[1] for representation on the Council.[2]

The Council shall meet from time to time as occasion may require, and at least once a year, at the Seat of the League, or at such other place as may be decided upon.

The Council may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

Any Member of the League not represented on the Council shall be invited to send a Representative to sit as a Member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League.

At meetings of the Council, each Member of the League represented on the Council shall have one vote, and may have not more than one Representative.

ARTICLE 5.

Except where otherwise expressly provided in this Covenant, or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.

All matters of procedure at meetings of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting.

The first meeting of the Assembly and the first meeting of the Council shall be summoned by the President of the United States of America.

[1] At the request of the Council, the Assembly on September 25, 1922, approved "the decision of the Council to increase the number of Members of the League chosen by the Assembly for representation on the Council from four to six."

[2] The Assembly voted in 1921 in favor of the following amendment, forming a third paragraph:

"*The Assembly shall fix by a two-thirds majority the rules dealing with the election of the non-permanent Members of the Council, and particularly such regulations as relate to their term of office and the conditions of re-eligibility.*"

Ratification was still pending in September, 1923.

ARTICLE 6.

The permanent Secretariat shall be established at the Seat of the League. The Secretariat shall comprise a Secretary-General and such secretaries and staff as may be required.

The first Secretary-General shall be the person named in the Annex; thereafter the Secretary-General shall be appointed by the Council with the approval of the majority of the Assembly.

The secretaries and the staff of the Secretariat shall be appointed by the Secretary-General with the approval of the Council.

The Secretary-General shall act in that capacity at all meetings of the Assembly and of the Council.

The expenses of the Secretariat shall be borne by the Members of the League in accordance with the apportionment of the expenses of the International Bureau of the Universal Postal Union.[1]

ARTICLE 7.

The Seat of the League is established at Geneva.

The Council may at any time decide that the Seat of the League shall be established elsewhere.

All positions under or in connection with the League, including the Secretariat, shall be open equally to men and women.

Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable.

ARTICLE 8.

The Members of the League recognize that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations.

The Council, taking account of the geographical situation and circumstances of each State, shall formulate plans for such reduction for the consideration and action of the several Governments.

Such plans shall be subject to reconsideration and revision at least every 10 years.

After these plans shall have been adopted by the several Governments, the limits of armaments therein fixed shall not be exceeded without the concurrence of the Council.

The Members of the League agree that the manufacture by private enterprise of munitions and implements of war is open to grave objections. The Council shall advise how the evil effects attendant upon such manufacture can be prevented, due regard being had to the necessities of those Members of the League which are not able to manufacture the munitions and implements of war necessary for their safety.

The Members of the League undertake to interchange full and frank

[1] The Assembly voted in 1921 in favor of the following amendment, to be paragraph 5:

"The expenses of the League shall be borne by the Members of the League in the proportion decided by the Assembly."

Ratification was still pending in September, 1923.

information as to the scale of their armaments, their military, naval and air programs, and the condition of such of their industries as are adaptable to warlike purposes.

ARTICLE 9.

A permanent Commission shall be constituted to advise the Council on the execution of the provisions of Articles 1 and 8 and on military, naval and air questions generally.

ARTICLE 10.

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

ARTICLE 11.

Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise, the Secretary-General shall, on the request of any Member of the League, forthwith summon a meeting of the Council.

It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends.

ARTICLE 12.[1]

The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the report by the Council.

In any case under this Article the award of the arbitrators shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.

ARTICLE 13.[2]

The Members of the League agree that, whenever any dispute shall arise between them which they recognize to be suitable for submission to

[1] The Assembly voted in 1921 in favor of the following amendments:

"The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration *or judicial settlement* or to inquiry by the Council and they agree in no case to resort to war until three months after the award by the arbitrators *or the judicial decision*, or the report by the Council.

"In any case under this Article, the award of the arbitrators *or the judicial decision* shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute."

Ratification was still pending in September, 1923.

[2] The Assembly voted in 1921 in favor of the following amendments:

"The Members of the League agree that, whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration

arbitration and which can not be satisfactorily settled by diplomacy, they will submit the whole subject matter to arbitration.

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration.

For the consideration of any such dispute the court of arbitration to which the case is referred shall be the court agreed on by the parties to the dispute or stipulated in any convention existing between them.

The Members of the League agree that they will carry out in full good faith any award that may be rendered and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award, the Council shall propose what steps should be taken to give effect thereto.

ARTICLE 14.

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

ARTICLE 15.

If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary-General, who will make all necessary arrangements for a full investigation and consideration thereof.[1]

or judicial settlement, and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration *or judicial settlement.*

"Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration *or judicial settlement.*

"*For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.*

"The Members of the League agree that they will carry out in full good faith any award *or decision* that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award *or decision,* the Council shall propose what steps should be taken to give effect thereto."

Ratification was still pending in September, 1923.

[1] The Assembly voted in 1921 in favor of the following amendment, to be paragraph one:

"*If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration* or judicial settlement *in accordance with Article 13, the Members of the League agree that*

For this purpose the parties to the dispute will communicate to the Secretary-General, as promptly as possible, statements of their case, with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

The Council shall endeavor to effect a settlement of the dispute and, if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

If the dispute is not thus settled, the Council, either unanimously or by a majority vote, shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

If a report by the Council is unanimously agreed to by the Members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within 14 days after the submission of the dispute to the Council.

In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the Reprsentatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

Article 16.[1]

Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have

they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary-General, who will make all necessary arrangements for a full investigation and consideration thereof.

Ratification was still pending in September, 1923.

[1] The Assembly voted in 1921 in favor of the following amendments to Art. 16, to replace paragraph one:

"Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have

committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimize the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are coöperating to protect the covenants of the League.

Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

ARTICLE 17.

In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of Membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16, inclusive, shall be applied with such modifications as may be deemed necessary by the Council.

Upon such invitation being given, the Council shall immediately in-

committed an act of war against all other Members of the League, *which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between persons residing in their territory and persons residing in the territory of the Covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between persons residing in the territory of the Covenant-breaking State and persons residing in the territory of any other State, whether a Member of the League or not.*

"It is for the Council to give an opinion whether or not a breach of the Covenant has taken place. In deliberations on this question in the Council, the votes of Members of the League alleged to have resorted to war and of Members against whom such action was directed shall not be counted.

"The Council will notify to all Members of the League the date which it recommends for the application of the economic pressure under this Article.

"Nevertheless, the Council may, in the case of particular Members, postpone the coming into force of any of these measures for a specified period where it is satisfied that such a postponement will facilitate the attainment of the object of the measures referred to in the preceding paragraph, or that it is necessary in order to minimize the loss and inconvenience which will be caused to such Members."

Ratification was still pending in September, 1923.

stitute an inquiry into the circumstances of the dispute and recommend such action as may seem best and most effectual in the circumstances.

If a State so invited shall refuse to accept the obligations of Membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action.

If both parties to the dispute, when so invited, refuse to accept the obligations of Membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

ARTICLE 18.

Every treaty of international agreement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.

ARTICLE 19.

The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world.

ARTICLE 20.

The Members of the League severally agree that this Covenanat is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligation inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.

ARTICLE 21.

Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.

ARTICLE 22.

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be intrusted to advanced nations who, by reason of their resources, their experience or their geographical position, can best undertake this responsibility, and who are willing to accept it,

and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defense of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as Southwest Africa and certain of the South Pacific islands, which, owing to the sparseness of their population or their small size, or their remoteness from the centers of civilization, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories, and to advise the Council on all matters relating to the observance of the mandates.

Article 23.

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

(*a*) will endeavor to secure and maintain fair and humane conditions of labor for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organizations;

(*b*) undertake to secure just treatment of the native inhabitants of territories under their control;

(*c*) will intrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children and the traffic in opium and other dangerous drugs;

(*d*) will intrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest;

(*e*) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914-1918 shall be borne in mind;

(*f*) will endeavor to take steps in matters of international concern for the prevention and control of disease.

ARTICLE 24.

There shall be placed under the direction of the League all international bureaus already established by general treaties, if the parties to such treaties consent. All such international bureaus and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League.

In all matters of international interest which are regulated by general conventions but which are not placed under the control of international bureaus or commissions, the Secretariat of the League shall, subject to the consent of the Council and if desired by the parties, collect and distribute all relevant information and shall render any other assistance which may be necessary or desirable.

The Council may include as part of the expenses of the Secretariat the expenses of any bureau or commission which is placed under the direction of the League.

ARTICLE 25.

The Members of the League agree to encourage and promote the establishment and coöperation of duly authorized voluntary national Red Cross organizations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world.

ARTICLE 26.[1]

Amendments to this Covenant will take effect when ratified by the Members of the League whose Representatives compose the Council and by a majority of the Members of the League whose Representatives compose the Assembly.

No such amendment shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League.

[1] The Assembly voted in 1921 in favor of the following amendments to replace Art. 26:

"Amendments to the present Covenant the text of which shall have been voted by the Assembly on a three-fourths majority, in which there shall be included the votes of all the Members of the Council represented at the meeting, will take effect when ratified by the Members of the League whose Representatives composed the Council when the vote was taken and by the majority of those whose Representatives form the Assembly.

"If the required number of ratifications shall not have been obtained within twenty-two months after the vote of the Assembly, the proposed amendment shall remain without effect.

"The Secretary-General shall inform the Members of the taking effect of an amendment.

"Any Member of the League which has not at that time ratified the amendment is free to notify the Secretary-General within a year of its refusal to accept it, but in that case it shall cease to be a Member of the League."

Ratification was still pending in September, 1923.

ANNEX

I. Original Members of the League of Nations, Signatories of the Treaty of Peace.

United States of America
Belgium
Bolivia
Brazil
British Empire
  Canada
  Australia
  South Africa
  New Zealand
  India
China
Cuba
Ecuador
France
Greece
Guatemala
Haiti
Hedjaz
Honduras
Italy
Japan
Liberia
Nicaragua
Panamá
Perú
Poland
Portugal
Rumania
Serb-Croat-Slovene State
Siam
Czecho-Slovakia
Uruguay

States Invited to Accede to the Covenant.

Argentine Republic
Chile
Colombia
Denmark
Netherlands
Norway
Paraguay
Persia
Salvador
Spain
Sweden
Switzerland
Venezuela

APPENDIX B.

PERMANENT COURT OF INTERNATIONAL JUSTICE[1]

Protocol of Signature

The Members of the League of Nations, through the undersigned, duly authorized, declare their acceptance of the adjoined Statute of the Permanent Court of International Justice, which was approved by a unanimous vote of the Assembly of the League on the 13th December, 1920, at Geneva.

Consequently, they hereby declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above-mentioned Statute.

The present Protocol, which has been drawn up in accordance with the decision taken by the Assembly of the League of Nations on the 13th December, 1920, is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations.

The said Protocol shall remain open for signature by the Members of the League of Nations and by the States mentioned in the Annex to the Covenant of the League.

The Statute of the Court shall come into force as provided in the above-mentioned decision.

Executed at Geneva, in a single copy, the French and English texts of which shall both be authentic.

December 16, 1920.

[Here follow signatures.]

Optional Clause

The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory, *ipso facto* and without special Convention, the jurisdiction of the Court in conformity with article 36, paragraph 2, of the Statute of the Court, under the following conditions:

[Here follow signatures with statements of conditions applying to each Member signing.]

STATUTE

For the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations

Article 1. A Permanent Court of International Justice is hereby established in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration

[1] The text is that issued by the League of Nations.

organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

Chapter I

Organization of the Court

Art. 2. The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Art. 3. The Court shall consist of fifteen members: eleven judges and four deputy-judges. The number of judges and deputy-judges may hereafter be increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of fifteen judges and six deputy-judges.

Art. 4. The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

In the case of Members of the League of Nations not represented in the Permanent Court of Arbitration, the list of candidates shall be drawn up by national groups appointed for this purpose by their Government under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.[1]

Art. 5. At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the Members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant or to the States which join the League subsequently, and to the persons appointed under paragraph 2 of Article 4, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number

[1] Article 44 of the convention of The Hague of 1907 for the pacific settlement of international disputes reads as follows:

"Each contracting Power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrator.

"The persons thus selected are inscribed, as members of the Court, in a list which shall be notified to all the contracting Powers by the Bureau.

"Any alteration in the list of arbitrators is brought by the Bureau to the knowledge of the contracting Powers.

"Two or more Powers may agree on the selection in common of one or more members.

"The same person can be selected by different Powers.

"The member of the Court are appointed for a term of six years. These appointments are renewable.

"Should a member of the Court die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case the appointment is made for a fresh period of six years."

of candidates nominated be more than double the number of seats to be filled.

ART. 6. Before making these nominations, each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law.

ART. 7. The Secretary-General of the League of Nations shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible for appointment.

The Secretary-General shall submit this list to the Assembly and to the Council.

ART. 8. The Assembly and the Council shall proceed independently of one another to elect, firstly the judges, then the deputy-judges.

ART. 9. At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.

ART. 10. Those candidates who obtain an absolute majority of votes in the Assembly and in the Council shall be considered as elected.

In the event of more than one national of the same Member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

ART. 11. If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

ART. 12. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Conference is unanimously agreed upon any person who fulfils the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Articles 4 and 5.

If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been appointed shall, within a period to be fixed by the Council, proceed to fill the vacant seats by selection from among those candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes among the judges, the eldest judge shall have a casting vote.

ART. 13. The members of the Court shall be elected for nine years.

They may be re-elected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

ART. 14. Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the Court elected to replace a member whose period of appointment had not expired will hold the appointment for the remainder of his predecessor's term.

ART. 15. Deputy-judges shall be called upon to sit in the order laid down in a list.

This list shall be prepared by the Court and shall have regard firstly to priority of election and secondly to age.

ART. 16. The ordinary Members of the Court may not exercise any political or administrative function. This provision does not apply to the deputy-judges except when performing their duties on the Court.

Any doubt on this point is settled by the decision of the Court.

ART. 17. No Member of the Court can act as agent, counsel or advocate in any case of an international nature. This provision only applies to the deputy-judges as regards cases in which they are called upon to exercise their functions on the Court.

No Member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel or advocate for one of the contesting parties, or as a Member of a national or international Court, or of a Commission of inquiry, or in any other capacity.

Any doubt on this point is settled by the decision of the Court.

ART. 18. A member of the Court can not be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

Formal notification thereof shall be made to the Secretary-General of the League of Nations, by the Registrar.

This notification makes the place vacant.

ART. 19. The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

ART. 20. Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

ART. 21. The Court shall elect its President and Vice-President for three years; they may be re-elected.

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.

ART. 22. The seat of the Court shall be established at The Hague.

The President and Registrar shall reside at the seat of the Court.

ART. 23. A session of the Court shall be held every year.

Unless otherwise provided by rules of Court, this session shall begin on the 15th of June, and shall continue for so long as may be deemed necessary to finish the cases on the list.

The President may summon an extraordinary session of the Court whenever necessary.

ART. 24. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall also inform the President.

If the President considers that for some special reason one of the members of the Court should not sit on a particular case, he shall give him notice accordingly.

If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

ART. 25. The full Court shall sit except when it is expressly provided otherwise.

If eleven judges can not be present, the number shall be made up by calling on deputy-judges to sit.

If, however, eleven judges are not available, a quorum of nine judges shall suffice to constitute the Court.

ART. 26. Labor cases, particularly cases referred to in Part XIII (Labor) of the Treaty of Versailles and the corresponding portion of the other Treaties of Peace, shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. On all occasions the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to insuring a just representation of the competing interests.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favor of a judge chosen by the other party in accordance with Article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Labor cases" composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labor Office. The Governing Body will nominate, as to one half, representatives of the workers, and as to one half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding Articles of the other Treaties of Peace.

In Labor cases the International Labor Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.

ART. 27. Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favor of a judge chosen by the other party in accordance with Article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Transit and Communications cases" composed of two persons nominated by each Member of the League of Nations.

ART. 28. The special chambers provided for in Articles 26 and 27 may, with the consent of the parties to the dispute, sit elsewhere than at The Hague.

ART. 29. With a view to the speedy dispatch of business, the Court shall form annually a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.

ART. 30. The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

ART. 31. Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this Article shall fulfil the conditions required by Articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.

ART. 32. The judges shall receive an annual indemnity to be determined by the Assembly of the League of Nations upon the proposal of the Council. This indemnity must not be decreased during the period of a judge's appointment.

The President shall receive a special grant for his period of office, to be fixed in the same way.

The Vice-Presidents, judges and deputy-judges shall receive a grant for the actual performance of their duties, to be fixed in the same way.

Traveling expenses incurred in the performance of their duties shall be refunded to judges and deputy-judges who do not reside at the seat of the Court.

Grants due to judges selected or chosen as provided in Article 31 shall be determined in the same way.

The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the Court.

ART. 33. The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

CHAPTER II

Competence of the Court

ART. 34. Only States or Members of the League of Nations can be parties in cases before the Court.

ART. 35. The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant.

The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute toward the expenses of the Court.

ART. 36. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force.

The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory, *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

(*a.*) The interpretation of a Treaty.

(*b.*) Any question of International Law.

(*c.*) The existence of any fact which, if established, would constitute a breach of an international obligation.

(*d.*) The nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

ART. 37. When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal.

ART. 38. The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

2. International custom, as evidence of a general practice accepted as law;

3. The general principles of law recognized by civilized nations;

4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto.

CHAPTER III

Procedure

ART. 39. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English.

In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court will be given in French and English. In this case the Court will at the same time determine which of the two texts shall be considered as authoritative.

The Court may, at the request of the parties, authorize a language other than French or English to be used.

ART. 40. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the contesting parties must be indicated.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through the Secretary-General.

ART. 41. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

ART. 42. The parties shall be represented by Agents.

They may have the assistance of Counsel or Advocates before the Court.

ART. 43. The procedure shall consist of two parts: written and oral.

The written proceedings shall consist of the communication to the judges and to the parties of cases, counter-cases and, if necessary, replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

The oral proceedings shall consist of the hearing by the court of witnesses, experts, agents, counsel and advocates.

ART. 44. For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the Government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

ART. 45. The hearing shall be under the control of the President or, in his absence, of the Vice-President; if both are absent, the senior judge shall preside.

ART. 46. The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

ART. 47. Minutes shall be made at each hearing, and signed by the Registrar and the President.

These minutes shall be the only authentic record.

ART. 48. The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

ART. 49. The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

ART. 50. The Court may, at any time, intrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an inquiry or giving an expert opinion.

ART. 51. During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

ART. 52. After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

ART. 53. Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favor of his claim.

The Court must, before doing so, satisfy itself, not only that it has

jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

ART. 54. When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed.

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

ART. 55. All questions shall be decided by a majority of the judges present at the hearing.

In the event of an equality of votes, the President or his deputy shall have a casting vote.

ART. 56. The judgment shall state the reasons on which it is based.

It shall contain the names of the judges who have taken part in the decision.

ART. 57. If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion.

ART. 58. The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

ART. 59. The decision of the Court has no binding force except between the parties and in respect of that particular case.

ART. 60. The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

ART. 61. An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings for revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

The application for revision must be made at latest within six months of the discovery of the new fact.

No application for revision may be made after the lapse of ten years from the date of the sentence.

ART. 62. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party.

It will be for the Court to decide upon this request.

ART. 63. Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

ART. 64. Unless otherwise decided by the Court, each party shall bear its own costs.

APPENDIX C.

SELECT REFERENCES

The following references have been selected with the object of introducing the student to the more important works bearing upon the subject-matter of the successive chapters and their sub-divisions. In making the selection the facilities of the average university or college library have been kept in view, and no attempt has been made to present an exhaustive list of authorities which might have the effect of bewildering rather than guiding the student in further research work. Brief comment follows the more important works as a means of enabling the student to determine more readily the character of the material to be looked for in the particular volume. The grouping of the references under letters, a, b, c, d, etc., conforms to the classification of subject-matter in the table of contents.

Chapter I

The Historical Background of International Law

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Maine, Sir Henry, *Ancient Law* (Pollocks' ed., Oxford, 1906). A useful survey of the development of legal relations from family status to independent contract, showing incidentally the development of legal procedure.

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INDEX

Judicial decisions are indexed in the Table of Cases

A

Aaland Islands: neutralization of, 88
Abuse of neutral flag. *See* Flag
Abyssinia: status of, 99, 104
Accretion: title by, 229-230
Acquisition of territory: modes of, 221-243
Act of state, 387
Adjective law, 130-131
Adriatic Sea: claims to exclusive jurisdiction over, 291
Aërial law: in time of peace, 286-290
  in time of war, 570-573
  draft code of, in warfare, 572
Aërial Navigation Convention (1919), 288
Aërial raids, 571
Aëronauts. *See* Aërial law
Aëroplanes. *See* Aërial law
Africa: partition of, 27
  hinterland problems, 229
Air Navigation, International Commission for, 289
Air-ships. *See* Aërial law
Aix-la-Chapelle, Congress of (1818): classification of public ministers by, 355
Alabama: battle with *Kearsarge* off coast of France, 253
Alabama Claims: origin of, 564
  settlement of, by arbitration, 405-564
Alaska: purchase of, by United States, 233
Albania: status of, 98-99
Algeciras, Congress of, 98
Alien enemy: rights of, 445
  restrictions upon, 447-450
Alien Property Custodian: United States, 450
  British, 449
Aliens: position of, in ancient Greece, 8-9
  jurisdiction over, 175
  admission of, 175-176
  expulsion of, 178
  rights conceded to, 178
  discrimination against, 179
  domiciled, 180
  enemy, status of, 445
  expulsion of, 445
  access of, to courts, 447
  property of, 448
  liability of neutral, to military service, 528
  to other burdens, 529
Allegiance: doctrine of indelible, 169
  due to military occupant, 479
Alliance: Holy, 24-25
  Dual: in relation to self-defense, 147
  Triple: in relation to self-defense, 147
Alliances and balance of power, 147
Alluvion, 230
Alsace-Lorraine: right of option in (1870), 240
Alvarez, A., 59
Amazon River: navigation of, 265
Ambassadors. *See* Diplomatic agents
Amelia Island: invasion of (1817), 143
American Institute of International Law, 71, 125, n. 1
American Society of International Law, 71
Amnesty: effect of termination of war, 578
Ancona: sinking of the, 517
Angary: belligerent right of, 529-531
  resort to, by neutrals, 531
Anglo-Boer war: use of concentration camps in, 477
Antivari: blockade of (1913), 424
Appam: case of the, 527
Arbitral Justice, Hague Court of. *See* Judicial Arbitration Court
Arbitration: among the ancient Greeks, 9
  of disputed interpretations of treaties, 336-337
  as a form of procedure, 403-414
  definition of, 403
  essential character of, 403
  basis of decision by, 404
  obligation to submit to award by, 405
  development of obligation to have recourse to, 406-409

obligations of, assumed under Covenant of League of Nations, 409
Arbitration, Hague Permanent Court of, 409
Arbitration treaties: Root, 407
Taft-Knox, 407
Wilson-Bryan, 416
Argentine Republic: arbitration treaty with Chili (1902), 408
Armaments, limitation of: object of Hague Conference of 1899, 28
object of Washington Conference (1921-22), 147
Armed Neutralities of 1780 and 1800, 508, 533, 537
Armistices: in general, 487-489
armistice of Nov. 11, 1918, 489, 576
relation of, to treaty of peace, 576
Arms: export of, not prohibited to neutrals, 567
Assassination: prohibition of, 468
Asylum: in embassies and legations, 186-188
on public ships in foreign ports, 203
Atlanta: burning of (1864), 476
Attentat clause, in extradition treaties, 215
Austin, J., *Province of Jurisprudence,* 40
Austinian or positive view of international law, 40-41
Australia: international status of, 99-100
Austria: granted freedom of transit to Adriatic, 282
Austria-Hungary: a "real union," 95
dissolution of, 95
ultimatum of, to Serbia in 1914, 400, 458
Avulsion: effect of, upon boundary line, 248
Azov, Sea of: a territorial sea, 269

B

Bakhmeteff: status of, as ambassador, 354
Balance of power: historical basis of, 19-21, 27
in relation to self-defense, 147
Baltic Sea: claims to exclusive jurisdiction over, 291
Bancroft treaties, 171
Baralong, incident of the, 498
Bays: boundary line in, 256
territorial, 257-258
servitudes upon, 268
Belgium: neutralization of, 88-89
violation of neutrality of, by Germany, 88, 145, 348
Belle Isle, Maréchal de: affair of, 367
Belligerency: recognition of, 108-110
Belligerent communities: status of, 101-102
Belligerents: intercourse between, 484
agreements between, 485
See Combatants
Bering Sea Seal Fisheries Arbitration, 295-296
Berlin Conference (1885), 27, 88, 208, 227
Berlin, treaty of (1878): imposes conditions upon Balkan States, 91
Berne agreement (United States-Germany, 1918), 472, n. 2
Black Sea: an open sea, 270; neutralization of, 347
Blair, Minister: affair of, 356
Blockade: of enemy country as method of warfare, 505
opposing doctrines of, 537
scope of, 537
effectiveness of, 538
notification of, 539
new doctrines of, during American Civil War, 540
practice of, during World War, 541
Bluntschli, 58, 72
Bodin, definition of sovereignty by, 44, n. 4
Bolivia-Chili boundary dispute, 328, n. 4
Bombardment: lawful methods of, 473-475
by air-ships, 570
Bonfils, H.: as writer, 58, 72
quoted on humanity in warfare, 437, n. 1
Booty. *See* Pillage
Bopp, Consul: conviction of, 376
Bosnia and Herzegovina: annexation of, by Austria-Hungary, 348
Bosphorus: a Turkish territorial water, 259
servitude upon, 271-272
warships excluded from, 272
internationalized by treaty of Lausanne, 273
Boundaries: in general, 245-260
determination of, 245
"natural" and artificial, 246
See Rivers, Straits, Lakes, Marginal sea, Bays, Gulfs
Boxer riots in China, 158-159
responsibility of China for, 395
Boy-Ed, Captain: recall of, 370
Brazil: refusal of, to support International Prize Court, 553
Bridges: dividing line upon, 249
British Commonwealth of Nations, 100, n. 1

Brussels: Conference of 1874, 27, 73
Conference of 1890, 27
Bulgaria: under treaty of Berlin, 91-92, 348
Bullets, expanding and explosive, 463-465
Burroughs, Sir J.: on British sea claims, 293
Bynkershoek: scientific attitude of, 55
on freedom of seas, 293

C

Cabell Act (1922), 174
California: legislation of, against Japanese, 179-180
Calvo, C., 59
Calvo Doctrine, 159, 394
Canada: international status of, 99-100
treaty-making powers of, 322
Canals, interoceanic: servitudes upon, 273-278
Canon law: influence of, 16-17
Capital: investment of, opportunities for, 308
Capitulations: in non-Christian states, 188-189, 377
Capitulations: in time of war, 486
Caroline, case of the, 130, 144
Cartels, 486
Casablanca case, 375, n. 2
Catacazy, Minister: affair of, 369
Caudine Forks: incident of, 486
Cavell, Edith: case of, 470
Cellamare, Prince: affair of, 362
Central American Federation of 1921, 117
Cession: title by, 232
forms of, 233
by treaty of peace, 234
Chablais and Faucigny: servitude upon, 282
Chamizal Arbitration Convention, 248
Chargé d'Affaires: diplomatic status of, 355, 357
Charlton: extradition of, 213, 343
Chesapeake: case of the, 524
Chesapeake Bay: a territorial water, 257
Children: nationality of, 174
Chili: boundary dispute with Peru and Bolivia, 328, n. 4
arbitration treaty with Argentine Republic, 408
China: admitted into family of nations, 83, 104
leases of land in, to foreign powers, 243-244
rivalry of Great Powers over, 309-310
provisions of Washington Conference relating to, 310
treaties entered into by, under duress, 329, 331
violation of neutrality of, 525
China: removal of reservists from steamship, 549
Chinese: immigrants excluded from United States, 177; railways subject to servitudes, 281
Church (Roman), influence of, upon international relations, 15
Citizenship: by birth, 165-168
jure soli, 165-167
jure sanguinis, 166-167
by naturalization, 168-169. *See* Nationality
Civil law: influence of, 16
Claims: of citizens against foreign governments, 157-159
Clayton-Bulwer treaty. *See* Panama Canal
Codification of international law, 72-75
Collective responsibility, of all nations for acts of each: absence of, in general, 46
limited, on part of League of Nations, 48, 381
Collision on the high seas: jurisdiction in cases of, 197
regulations to prevent, 294-295
Colonial protectorates, 228
Combatants: and non-combatants, 437
lawful, 460-463, 493
Comity, international, 35, 181
Commerce: development of, as an object of foreign policy, 306
difficulty of adjusting national policies relating to, 314-315
Commercia belli, 455
Concentration camps: use of, in warfare, 477
Concessions: in cases of succession, 119
as a ground of international rivalry, 308
Confederate States of America: recognized as belligerents by Great Britain, 109, 354, 459
Confederation: members of a, 94
Confederation, German (1815), 94
Conferences. *See* International Conferences
Conflict of laws, 36, 182-183
Congo basin, neutralization of, 88
Congo Conference of 1885, 88, 208
Congo Free State: recognition of, 105
devised by King Leopold to Belgium, 233
Congo river: navigation of, 266

Congresses. *See* International Congresses
Conquest: title to territory by, 241
effects of, 242
Consolato del Mare, 17, 508, 533
Consular jurisdiction in Orient, 188-189, 377
Consulates: inviolability of, 375
Consuls: legal status of, 372
grades of, 373
appointment and authorization of, 373
functions of, 374
privileges and immunities of, 375
special status of, in Orient, 377
Contiguity: doctrine of, 226
Continuity of states, 111-116
Continuous transports: doctrine of, 540, 545
Continuous voyage: doctrine of, 540
Contraband: what constitutes, 543
opposing doctrines of, 543
practice regarding, during World War, 546
penalty for carriage of, 547
Contract debts owing by foreign governments to citizens, 159-160
convention respecting the limitation of the employment of force for the recovery of, 409
Contributions: levying of, in warfare, 481
Conversion of merchant ships into warships, 494-495
Convoy: status of neutral vessels under, 550
Corfu: seizure of, by Italy, 391, 427
Corinth Canal, 274
Corinto: seizure of, by British, 426
Corpus Juris Civilis, 16
Crampton, Minister: dismissal of, 371
Creole, case of the, 195
Crete, as vassal state, 96
Crews of captured merchant ships, 498, 516
Crimes, international, 380, n. 3
Cuba: under Platt Amendment, 92
recognition of, 106
negative servitude upon, 284
restrictions upon external independence, 301, 322
Custom, as a source of international law, 6, 61-63
"Customs (Laws) of the Hellenes," 8
Czechoslovakia: under treaty of St. Germain, 91
recognition of (1918), 106
easements obtained by (1919), 282

D

Danish fleet, seizure of, by British (1807), 144, 525
Danish Sound dues, 271
Danish West Indies: treaty to cede, subject to plebiscite, 236
right of option in, 239
Dante's *De Monarchia*, 18
Danube: servitude upon, 263
Mixed Commission of the, 264, 267
Dardanelles: a Turkish territorial water, 259
servitude upon, 271
warships excluded from, 272
internationalized by treaty of Lausanne, 273
Debt, public: apportionment of, in cases of succession, 119, 120, 121
Deceit: legitimate use of, in warfare, 467, 501
Declaration of London, 29, 535-552, passim
Declaration of Paris of 1856: in relation to privateering, 493
in relation to enemy goods on neutral vessels, 508
in relation to neutral goods on enemy ships, 532-534
in relation to blockade, 537, 538
Declaration of St. Petersburg of 1868, 438, n. 4, 463
Declaration of the Rights of Nations (Abbé Gregoire's), 22
Declaration of the Rights and Duties of Nations, 125, n. 1
Declaration of war: ancient Roman, 12
in modern warfare, 457-460
Decretum of Gratian, 16
Delaware Bay: a territorial water, 257
Denmark, Great Belt of, 259
Denver: anti-Chinese riots at, 392, 393
Depierre: affair of, 170
Deportation of enemy civilians, as a war measure, 483-484
Desertion, inciting of enemy troops to, 468
Despagnet, F., 58, 72
Destruction: of enemy merchant ships, 511
of neutral merchant ships, 551-552
Devastation: forbidden in warfare, 475
Dillon, Consul: affair of, 377
Diplomacy: as distinguished from international law, 37
Diplomatic agents: position of, in ancient Greece, 9, 350, 360
in general, 350-371
classification of, 354-356

functions of, 358-360
privileges and immunities of, 360-366
rights of, with respect to third states, 366-368
recall and dismissal of, 369-371
Diplomatic corps, 355
Diplomatic relations: breach of, 371, 427, 440
Discovery: does not of itself give title, 222
Dogger Bank incident, 415
Domicile: as test of enemy character, 454, 509-511
Dominican Republic: status of, 93
Double allegiance: problem of, 175
Drago Doctrine, 160
Dresden: attack upon, in Chilian territorial waters, 526
Dubois, Minister: refusal of, to testify, 363
"Due diligence." *See* Alabama Claims
Dumba, Ambassador: recall of, 370
Dum dum bullets; use of, prohibited, 464-465
Dunkirk: agreement not to fortify, 283, 333
Duress: in relation to faith of treaties, 327-330
Dutch merchant ships: requisition of (1917), 531

E

Easements, 261-285. *See* Servitudes
Egypt: status of, 96-97, 353
mixed tribunals of, 189
Eighteenth Amendment: in relation to foreign vessels in port, 194
in relation to extension of three-mile limit, 255
Elbe river: navigation of, 266
Embargo: as a form of forcible procedure, 423
Enemy aliens. *See* Aliens
Enemy character: test of, 454
vessels, 508
cargoes, 509
Enemy citizens: commercial intercourse between, 453-456
"Enemy ships, enemy goods": doctrine of, 533
Envoys. *See* Diplomatic agents
Equality of states: a characteristic of states, 132
of legal capacity, 134
in respect to the adoption of new rules of law, 134
at the Hague Conferences, 136
in the Assembly of the League of Nations, 138
Ernst, C., case of, 171
Erosion: effect of, upon boundaries, 248
Eupen: transferred subject to plebiscite, 237
Evidences of international law, 66-70
Exchange of territory, 233
Exemptions from jurisdiction, 183-189
Exequatur of consuls. *See* Consuls
Existence, right of, 142-162
Expatriation: "right" of, 170
Explosive bullets. *See* Bullets
Exterritoriality, theory of: as applied to merchant vessels, 191
as applied to public ministers, 360
Extinction of states, 116
Extradition: legal basis of, 210
conditions attached to treaties of, 211
need of uniform rule of, 215
attempted extradition of ex-Kaiser, 216
Extraterritorial jurisdiction: in non-Christian states, 188

F

Falaba: case of the, 517
Falerii: case of schoolmaster of, 13, n. 2
Falkland Islands: title to, by occupation, 224-225
Federal state: members of a, 95
Fenians: responsibility of United States for attack by, 390
Fetials, College of, 12
Feudal system: effects of, 14
Field, D. D., 75
Fines: imposition of, in warfare, 481
Fiore, P.: code prepared by, 75
views on treaty obligations, 346
Fishing: regulation of, on high seas, 295
Fishing vessels: exemption of, from capture, 506-507
Flags, national: conditions upon which merchant vessels may use, 190
use of, in warfare, as form of deceit, 467, 501
Florida: case of the, 524, 556
Foodstuffs as contraband. *See* Contraband
Forcible procedure by methods short of war, 420-427
Foreign Enlistment Act, British, 561, n. 2
Foreign markets: struggle of nations for, 307
Foreign policy: definition of, 37
objectives of, 302-308
Foreigners. *See* Aliens

Formosa: pacific blockade of, 426
Fourteenth Amendment: in relation to citizenship, 165, n. 3
France: attitude towards neutral goods on enemy ships, 534
towards transfer of flag, 535
towards conditions of blockade, 539-540
towards contraband, 543
"Free ships, free goods": doctrine of, 508, 533
Freedom of the seas: in time of war, 297
political aspects, 297
as affected by naval armaments, 298
French Revolution, effect of, upon international relations, 22-23
Frontiers. *See* Boundaries
Fryatt, Captain: execution of, 497
Frye, William P.: affair of the, 551
Fuel: limitation upon supplies of, in neutral ports, 558
"Full Powers," of agent appointed to conclude treaties, 323, 357
Fundamental rights. *See* Rights

G

Garner, J. W.: quoted, 504, n. 6
Gases, asphyxiating and poisonous: Hague Declaration against, 464
use in World War, 465
prohibited by Washington Conference, 466
General Armstrong: case of the, 525, 556
General Orders No. 100. *See* Instructions for the Government of the Armies of the United States in the Field
Genêt, Minister: affair of, 369, 560
Geneva arbitration. *See* Alabama Claims
Geneva Conventions: of 1864, 27, 73, 472, 502
of 1868, 27, 73
of 1906, 73, 472, 502
Gentilis, A., as a jurist, 50
on Spanish sea claims, 292
German Empire: as a federal state, 95
citizenship law of, 172
See Germany
Germany: invasion of Belgium by 1914), 145, 462
servitudes imposed upon, by treaty of Versailles, 266, 278, 283, 301
war practice of, towards levies en masse, 462
treatment of prisoners by, 472
attitude of, towards armed merchant ships, 497, 559
defense of submarine warfare by, 497
use of mines by, 500
attacks upon hospital-ships by, 503
defense of bombardment of towns by, 504
protest of, against sale of munitions during World War, 568
agrees to hand over military offenders at close of war, 578
Ghiloni, F.: military service obligations of, 167-168
Gifts of territory, 233
Goeben and *Breslau*, German warships transferred to Turkey, 535
Gomez, case of, 200
Good faith: rule of, in relation to treaties, 319
Good offices and mediation: as a form of procedure, 400
examples of, 401
regulation of, by Hague conference, 401
Great Britain: foreign policy of, 304-305
attitude (1907) towards automatic contact mines, 500
test of enemy character held by, 454, 509
attitude towards neutral goods on enemy ships, 533, 534
towards transfer of flag, 534
towards blockade, 537, 539, 541, 542
towards contraband, 543, 547
Great Lakes: boundary line through, 250, 269
are "high seas" under federal law, 269
Great Powers: primacy of, 135-136, 140
represented in the Council of the League of Nations, 138
Greece: international law of ancient, 7-10
recognition of, 106, 109
rejects obligations of treaty of 1913, 348
blockade of ports of, by Great Powers, 424
by Great Britain (1850), 425
Greek city-states, 7
Greytown: bombardment of, as act of reprisal, 426
Grotian School of international law, 51
Grotian system, 51-52
Grotius: *De Jure Belli et Pacis*, 50
Mare Liberum, 292
referred to, 67, 74, 146, 210, 221,

230, 231, 235, 292, 345, 383, 429, n. 1, 3, 475, n. 3, 487, 520, 543
Guantánamo and Bahia Honda: lease of, 244
Guarantee: collective guarantee of neutralization, 88
treaties of, 343-344
of territorial integrity by League of Nations, 48, 381
Guerilla troops, 460
Guides: use of forced, in warfare, 480
Gulfs: servitudes upon, 268
Gyllenborg, Count: affair of, 362

H

Haggerty, Major: affair of, 373
Hague conventions: limited force of, 64, 318, 432
1. For pacific settlement of international disputes, 400, 406, 408, 415
2. For limitation of force for recovery of contract debts, 409
3. Relative to opening of hostilities, 458
4. Respecting laws and customs of war on land, 447, 461. *See* Hague Regulations
5. Respecting rights and duties of neutrals in war on land, 524, 530, 532, 562-565, 577
6. Relating to status of merchant ships at outbreak of hostilities, 451
7. Relating to conversion of merchant ships into warships, 494
8. Relative to submarine contact mines, 499
9. Concerning bombardment by naval forces, 503
10. For adaptation to maritime warfare of Geneva Convention, 502
11. Relative to restrictions upon right of capture in naval war, 498, 507
12. Relative to international prize court, 552-553
13. Concerning rights and duties of neutral powers in naval war, 524, 555-569, passim
Hague declarations of 1899 and 1907: against projectiles and explosives from balloons, 464
against asphyxiating and deleterious gases, 464
against dum dum bullets, 465
Hague Peace Conferences of 1899 and 1907: meeting of, 27
procedure at, 137
equality of states at, 136
conventions of. *See* Hague conventions
declarations of. *See* Hague declarations
Hague Permanent Court of Arbitration. *See* Arbitration
Hague Regulations respecting the laws and customs of war on land: 461-489, passim
Hague "wishes" (vœux), 492, 529
Haiti: international status of, 93
Hall, W. E.: as jurist, 56
quoted on treaty obligations, 345
Hanover: personal union of, with Great Britain, 95, n. 2
Hanseatic League, 17
Hautefeuille: views of, on treaty obligations, 346
Hay-Pauncefote treaty. *See* Panama Canal
Hebrews: war practice of, 7
Heffter, A. W.: 58
Helgoland: exchange of, for territory in Africa, 233
Hershey, A. S., 57, 72; cited, 70, n. 1, 451, n. 2
"High Court of International Justice," proposed, to try war crimes, 580
High seas: open to all nations, 291
law of the, 294
regulation of fishing on the, 295
regulation of submarine cables under the, 296
freedom of the, 297-299
Hinterland: delimitation of the, 228
Holland: attitude of, as neutral, towards belligerent air-ships, 571
refuses to extradite ex-Kaiser, 217, 579
Holy Alliance, 24-25, 151
Holy Roman Empire: international system of, 14
Horse-Shoe Reef: a "free gift" of territory, 233
Hospital ships, 472. *See* Geneva conventions
Hostages: taking of, by Germany (1914), 462
Hot pursuit, doctrine of, 254, n. 1
Hovering Acts, British, 254
Huascar, affair of the, 206
Hudson Bay: an open or a closed sea, 258, n. 3
Huerta, President: in relation to responsibility of Mexico, 156, 387
"Humane conduct," as understood in warfare, 436

Hyde, C. C.: 5-7; quoted, 70, n. 1, 483, n. 6
Hydro-aëroplanes: not technically "vessels," 572

I

Immigration. *See* Aliens, admission of
Immunities, of diplomatic agents. *See* Diplomatic agents
"Imperfect" rights: Vattel's classification, 129-130, 382
Westlake's reference, 128, n. 2
Impressment of seamen on American ships, 170
Independence, right of: nature of, 163
distinction between external and internal, 163-164
scope of internal, 164
scope of external, 300
India, British: international status of, 100
Individuals, not subjects of international law, 85, 220
Innocent passage, through marginal sea, 270
Inquiry, commissions of: before 1899, 414
as regulated by Hague convention, 415
in Dogger Bank case, 415
as provided for by Wilson-Bryan treaties, 416
as provided for by Covenant of League of Nations, 417
Institute of International Law: referred to, 71, 74, 185, 191, 199, 227, 258, 286, 294, 377, 395, 457
Instructions to Diplomatic Officers of United States, 363
Instructions for Government of Armies of United States, 460, 467
Insurgency: recognition of, 110-111
Insurgents: status of vessels in service of, 205
Inter Castera, bull of 1493, 222
Intercourse between belligerents, 484-485
International Administrative Law, 36
International Arbitration. *See* Arbitration
International Comity. *See* Comity
International Community: full membership in, 86-93;
partial membership in, 93-100
International Conferences: Berlin, 1885. *See* Berlin (Congo) Conference
The Hague, 1899, 1907. *See* Hague Peace Conferences of 1899 and 1907
International Congresses: Vienna, 1815. *See* Vienna. Paris, 1856. *See* Declaration of Paris. Berlin, 1878. *See* Berlin, treaty of
International crimes: piracy, 204
slave-trade, 206-209
indictment of German Kaiser, 578
International Ethics on Morality, 34
International law: historical background of, 3-33
definition of, 34
basis of, 37-40
is international law true law, 40
scope of, 43
development of science of, 50-60
determination of content of, 61-75
relation of, to municipal law, 76-82
persons of, 83-102
substantive, 130
adjective, 130
International Law Association, 71
International Maritime Conference, 199
International private law, 36, 182. *See* Conflict of Laws
International Prize Court. *See* Prize Court
International statute law. *See* Treaties, law-making
International Unions, 28, 36, 65, 318
Internment: of enemy aliens during World War, 446
of prisoners of war, 477
of belligerent troops in neutral territory, 526
of belligerent ships in neutral ports, 558
Interparliamentary Union, 71
Intervention: its legal basis, 150
directed against revolutionary governments, 151
to remove an international nuisance, 152
to put down international outlawry, 153
on "grounds of humanity," 154
in defense of national honor, 155
Invasion, as distinct from military occupation, 478
Ionian Islands: British protectorate over, 97-98
neutralization of, 88
See Corfu
Irish Free State: international status of, 100
Italy: seizure of Corfu by, 391

ultimatum of, to Turkey in 1911, 400
requisition of German ships by (1915), 531
Itata: affair of the, 111, 252

J

Jackson, Minister: dismissal of, 370
Japan: admission into family of nations, 83, 104
demands upon China in 1915, 329, 331
test of enemy character held by, 509
Japan, Inland Sea of, 258, n. 3
Japanese House Tax case, 334
Japanese: immigration of restricted, 177
rights of, in California, restricted, 179
Jefferson, T.: quoted on neutral duties, 562, n. 2
on sale of munitions by neutral, 567, n. 3
Jenkins, Consul: affair of, 375
Juan de Fuca, strait of, 260
Judicial Arbitration Court, 29, 411
Judicial decisions, as evidences of international law, 68-71
Judicial settlement: versus arbitration, 410
Jugoslavia, 32
Jurisdiction: over citizens, 165-175
over aliens, 175-181
special exemptions from, 183-189 193
over national merchant vessels, 190-193
over foreign merchant vessels in port, 193-200
over foreign public vessels in port, 200-204
concurrent, on the high seas, 204-209
over territory, 219-260
Jurisprudence: Austinian School of Positive, 40-41
School of Historical, 41-42
Jus bellicum, of ancient Rome, 12
Jus fetiale, of ancient Rome, 12
Jus gentium, 11
Jus naturale, 12
Jus postliminii, 577
Jus sanguinis, 166-167
Jus soli, 165-167
"Just causes of war," 383
Justiciable and non-justiciable questions, 407
Justinian, 13

K

Kaiser-ex, German: attempted extradition of, 216, 579
proposed trial of, for international offense, 578
Karlstad, treaty of, 95
Keiley, Minister: affair of, 356
Kent, J., 56
Kertch, strait of, 259
Key West: riots at, 158, 372
Kiel canal: a national canal before 1919, 274
internationalized, by treaty of Versailles, 278
Kleen, R., 58
Klüber, J. L., 58
Knoche: affair of, 170
Korea: extinction of, 116
invasion of, by Japan (1904), 144, 525
Kriegsbrauch im Landkriege, 436, n. 4
Kriegsraison: German theory of, 436
Kuhn, A. N.: quoted on air navigation, 289, n. 5

L

Lake Constance: servitudes upon, 269
Lake Michigan: open to British vessels, 264
Lakes: as boundaries, 249
servitudes upon, 269
Langdon, Lieut.: responsibility of Japan for death of, 388
Lansing-Ishii agreement, 150
La Plata river: navigation of, 265
Lausanne, treaty of, 122, n. 2
compulsory transfer of inhabitants under, 240-241
Law within the state: definition of, 3, 45, n. 2
implications of, 3
Law of Nations. *See* International Law
Law of Nature. *See* Natural Law
Lawrence, T. J., 56
"Laws of the Hellenes," 8
"Laws of humanity," 434
League of Nations: Covenant of the, significance of, 31-32
organization of, 46-47
functions of, 47-49
in relation to the equality of states, 138-141
in relation to right of self-help, 384
in relation to arbitration, 409
in relation to commissions of inquiry, 417
in relation to neutrality, 522

assembly of the: meetings of, 32-33
equality of states in, 138-139
council of the: position of Great Powers in, 138
Leases of territory, 243-244
Legations: asylum in foreign, 186
immunity of, 364
Le Long, P. A.: affair of, 168
Letters of Credence, 357
Letters of marque, 493
Letters of marque and reprisal, 421
Levée en masse: in warfare, 460-463
Lieber, F., 57, 74
Liszt, F. E. von, 58, 72
Loans: by neutral citizens to belligerents, lawful, 566
Lome, Minister de: recall of, 370
London Naval Conference of 1909: meeting of, 29
work of, 73, 495, 511, 535, 551, 553
See Declaration of London
Long Island Sound: a territorial water, 260
Louter, J. de, 58, 72
Lusitania: case of the, 515
Luxemburg: neutralization of, 88-89
negative servitude upon, 283

M

Machiavelli's *Prince,* 18
McLeod: case of, 388
Mafia riots at New Orleans, 158, 390, 393
Magdalena Bay, incident of, in relation to Monroe Doctrine, 284
Magellan's Straits: neutralization of, 271
Mail of belligerents, 507
Maine, Sir H., 41
Malmedy: transferred subject to plebiscite, 237
Mandate: territories under, 100-101
system of, 314
kinds of, 314
Manning, W. O., 56
Manouba: case of the, 549
Manu, Code of, 7
prohibition of use of poison by, 463
Mare Clausum of Selden, 292
Mare Liberum of Grotius, 292
Marginal sea: present extent of, 250
further extension of, 252
innocent passage through, 270
Maria: destruction of the (1914), 552
Marine league. *See* Marginal sea
Maritime boundary: *See* Marginal sea
Maritime warfare: laws of, 492-518
Married women, nationality of: in general, 173
in United States as affected by Cabell Act, 174
Marshall, Chief Justice, 57, 69
Martens, F. de, 58, n. 10
Martens, G. F. de, 55
Martial law, 479
distinguished from military government, 479
Medea: affair of the, 552
Mediation: semi-legal character of, 402. *See* Good offices and mediation
Membership in the community of nations: full, 86-93
partial, 93-101
Merchant marine: in relation to foreign policy, 313-314
Merchant vessels: national character of, 190-193
jurisdiction over, in foreign ports, 193-195
asylum not permitted upon, 199
seizure of, as a form of procedure, 423
status of enemy, at outbreak of war, 450, 506
status of armed, 495
conditions justifying attack upon, 511-517
sale of neutral, to belligerent, 564
Mesopotamia: mandate over, 101
Mexico: recognition of new governments of, 113-114
invasion of, by American troops in 1916, 144
rivalry of foreign capitalists to obtain concessions in, 311
Mexico, Gulf of: Spanish claims over, 222, 291
Middle Ages, international relations during, 14-16
Military expeditions from neutral territory, 563
Military government, 479
Military law: as distinguished from martial law, 479, n. 4
Military necessity: definition of, 434
distinguished from law of necessity, 436
German interpretation of, 436
Military occupation: in general, 477-484
when it begins, 478
scope of authority of occupant, 479
restrictions imposed upon, 480
Mines, automatic contact: 499-501
Ministers, public. *See* Diplomatic agents
Minorities: protection of, 91, 154, n. 3
Mississippi river: controversy over navigation of, 264

Mixed courts, 189, 377
Mob violence: responsibility of state in cases of, 392
Monroe Doctrine: historical origins, 26
in relation to national self-defense, 147
its semi-legal character, 148
in relation to the League of Nations, 149
in relation to intervention in Venezuela, 160
as a negative servitude upon American states, 284
as a leading foreign policy of United States, 304
doctrines of other states parallel to, 305
Montenegro: under treaty of Berlin, 90
absorbed in Jugoslavia, 32
Moore, J. B., 157
Morality, international: as distinct from law, 34
Moray Firth: a territorial bay, 258
Morocco: status of, as international person, 98
rivalry of Great Powers to control resources of, 308-309
Moser, J. J., 55
Most-favored-nation clause in treaties, 335-336
Mountains as boundaries, 246, 247
Municipal law: implied adoption of international law by, 76
Munitions of war: sale of, by neutral citizen to belligerent, 567

N

Nalbandian: extradition case of, 212
Napoleonic era; effect of, upon international relations, 23
Nationality. *See* Citizenship
Naturalization: citizenship by, 168
United States laws of, 168-169
Naturalization treaties, 171
Navigation: regulation of, 294
Necessity, law of, 436. *See* Military necessity
Negotiation: as a form of procedure, 399
Nemo potest exuere patriam, 169
Netherlands. *See* Holland
Neutral duties: of abstention, 554
of prevention, 555-565
Neutrality: general principles of, 519
development of law of, 520-522
present state of law of, 521
under Covenant of League of Nations, 522
Neutrality Laws: definition of, 561
as distinct from laws of neutrality, 561, n. 3
of the United States, 521, 561-565
of Great Britain, 561, n. 2
Neutralized states, 89-90
Neutral ports: permissible use of, by belligerent, 557-560
Neutral prizes: destruction of, 551
Neutral rights: in general, 524-536
in relation to belligerent airships, 571
Neutral status: acts forfeiting, 532-536
Neutral territory, inviolability of, 524
Newfoundland Fisheries case, 259, 280
New Orleans: Mafia riots at, 393
New Zealand: international status of, 99-100
Nicaragua: canal monopoly granted by, to United States, 285
Nice: annexed after plebiscite, 235
Niemen river: navigation of, 266
Niger river: navigation of, 266
Nikitchenkoff: affair of, 364
Non-combatants: distinguished from combatants, 437, 547
North Atlantic Coast Fisheries Arbitration, 259, 280
Northeastern Boundary Dispute, 405
North Sea: fishing rights along coasts of, 258
North Sea Fisheries Convention, 258
Norway, 95, 104
Norwegian vessels: requisition of (1917), 531, n. 3
Nuisance, removal of an international, 152
Nuncios: rank of, 355
Nystad, treaty of, 21

O

Occupation of territory: title by, 221
conditions of, 223
extent of area of, 225
notification as a condition of, 227
See Military occupation
Oder river: navigation of, 266
Oleron, laws of, 17
Open sea. *See* High seas
Oppenheim, L.: refered to, 56, 72, 347, 428, n. 1, 431, n. 1
Option: right of, 239-241
Oregon Boundary dispute, 226
Orinoco river: navigation of, 265
Ottoman Empire. *See* Turkey
Outer Mongolia: as vassal state, 97
Outlawry, self-defense against international, 153

P

Pacific blockade: as a form of forcible procedure, 424-426
Pacific measures of redress, 384, 399-419
Pacific Settlement of International Disputes, Convention for the, 400, 406, 408, 415
Pacifico, Don: affair of, 425
Palestine: mandate over, 314
Panama, international status of, 93
Panama, isthmus of: not subject to general servitude, 279
Panama Canal: neutralization of, 275
question of tolls upon, 276-277
neutrality of, in time of war, 277
fortification of, 277, 278, n. 2
interpretation of Hay-Pauncefote treaty, 332-333, 338
Panama Canal Zone: lease of, 244
Pantaleon Sa, Don: affair of, 366
Papen, Captain von: recall of, 370
Paraná river: navigation of, 265
Parlementaire: status of, in warfare, 485
Parole. *See* Prisoners
Partnerships, commercial, between enemy citizens, 455
Passports: in time of peace, 359
in time of war, 485, n. 8
Peaceful procedure, 399-419
Pelagic Sealing Conference (1911), 296
Pentarchy of 1818, 25
Permanent Court of International Justice, 32
decisions of, 122, n. 3, 164, n. 4, 167, n. 2
establishment of, 412
Statute of, 413
Persia: admitted into family of nations, 83, 104
as a field of international rivalry, 312
treaty of 1907 relating to, 331
Persona non grata, 369
Persona standi in judicio: in relation to enemy aliens, 447
Personal union, of states, 95, n. 2
Peru: Tacna-Arica controversy with Chili, 328, n. 4
Peterburg, incident of the, 494
Philippine Islands: cession of, 234
right of option in, 239
Phillimore, Sir R., 56
Piepenbrink: affair of (1914), 549
Pillage: forbidden in warfare, 475, 481
Piracy: suppression of, 204
in relation to privateering, 204
Plebiscite: as a condition of transfer of territory, 234-239
as practised during nineteenth century, 235
as provided for by peace treaties of 1919, 237
conditions of successful application of, 238-239
Poison: prohibition of, in warfare, 463
Poland: partitions of, 22, 115, 116
under treaty of Versailles, 91
Policy. *See* Foreign policy
Political offenses: excepted from treaties of extradition, 214
Political questions: as distinct from legal, 129
Pope: as arbitrator, 15
Porcupine river: open to British vessels, 265
Porto Rico: cession of, 234
option of Spanish subjects in, 239
Portugal: claims of, to jurisdiction over high seas, 222, 291
requisition of German ships by (1916), 531
Positivists, the, 55
Postal correspondence of belligerents, 507
Powers. *See* Great Powers
Prato, Ugo da: case of, 168
Prescription: title to territory by, 230-232
Primacy of the Great Powers, 135
Prisoners of war: treatment of, 470-473
Pritchard, Consul: affair of, 376
Privateering: practice of, 493
Prize Court, International, 30, 412, 553
Prize courts, national, 552
Prizes: destruction of, 511, 551
Procedure, law of: as distinguished from substantive law, 130
Property, private: capture of, at sea, as method of warfare, 505
proposed abolition of capture of, 505, 506, n. 3
Protection of citizens abroad, 156-160
Protectorates: as persons of international law, 97-99
colonial, 228
Provisions, as contraband. *See* Foodstuffs
Prussia, 116, 117, n. 3
Public opinion, as a sanction of international law, 42
Public vessels: jurisdiction over, in foreign ports, 200-204
submarine warfare upon, 512
Pufendorf, S., 53

Q

Quadruple Alliance of 1815, 25, 151
Quarter: obligation to give, 466

R

Racial minorities, protection of. *See* Minorities
Radio. *See* Wireless messages
Railway material from neutral territory. *See* Angary
Railways: foreign ownership of, as a servitude, 281
Ransom, 455
Ratification of treaties, 324-326
  subject to reservations, 325
  special rule applied to Hague conventions, 325-326
"Rationing" of neutral countries during World War, 542, 547
Raw materials of industry: competition for supplies of, 306-307
Real union of states, 95
Reason, a source of international law, 62, n. 4
Rebus sic stantibus: implied clause in treaties, 345, 348, n. 4
Recall of diplomatic agents, 369-370
Recognition: of new states, 103
  of revolting territories, 105
  of belligerency, 108
  of insurgency, 108
  of new governments, 112
  of de facto governments, 112
Red Cross. *See* Geneva Conventions
Redress for injuries: form of, 385
Remedial rights, 379-385
  as distinct from antecedent rights, 385
Repairs in neutral ports, 558
Reprisals: in time of peace, earlier forms of and modern practice, 421-422
  in time of war, as a sanction against unlawful conduct, 489-491
  their legality, 490
  directed against non-combatants, 490
Requisitions, in warfare, 482-484
Res nullius. *See* Occupation of territory
Responsibility of states: limitations of, 386
  for acts of public officers, 387-390
  for acts of citizens, 390-393
  arising from civil war, 393
  from international war, 395
Responsibility of individuals in warfare: new rules of, 579
Retaliation: in time of peace, 420
  in time of war, 489
Retorsion, 420
Revenue laws, enforcement of, beyond three-mile limit, 254
Rhine river: servitudes upon, 263, 267
Rhodian Sea Laws, 17
Ricci, Ambassador: affair of, 359
Right of representation, 352
Rights: fundamental, 127, 132
  secondary, 128
  perfect and imperfect, 129-130, 382
  of redress, 133
Rights of way, 281
Rio Grande: navigation of, 265
  regulation of flow of, 267
Rivers: as boundaries, 247
  servitudes upon, 263-268
  new international, 266-267
  regulation of flow of, 267-268
Rivier, A.: writings of, 58
  views of, on causes of war, 384, n. 2
Rock Springs: massacre of Chinese at, 158, 390, 393
Roman law: influence of, 16
Rome, as a city-state, 10
Root-Takahira agreement, 177
Root treaties of arbitration, 336, 407, 408, n. 1
Rule of 1756, 21, 549
Rumania: under treaty of Berlin, 91
  under treaty of St. Germain, 91
  as vassal state, 96
  recognition of, 106
Ruses of war. *See* Deceit
Russia: delayed recognition of Bolshevik government of, 114-115
  repudiation of treaty of 1856 by, 347
  alleged treachery of, in beginning war before declaration (1904), 457

S

Saar Basin: transfer of, made subject to plebiscite, 237
Sackville, Lord: dismissal of, 371
Safe-conduct: in warfare, 485, n. 8
Safeguard: in warfare, 485, n. 8
St. Albans: responsibility of Great Britain for attack upon, 390
St. Germain, treaty of, 91
St. Lawrence river: open to United States vessels, 264
St. Petersburg, declaration of, 438, n. 4, 463
Sakhalin: negative servitude upon, 283
Sale of territory, 233
Salvage: jurisdiction in suits for, 198
Sanction of international law, 42, 381
San Domingo. *See* Dominican Republic

Sardinia: continuity of, 115
Savages: use of, in warfare, 461
Savigny, F. K. von, 41
Savoy: annexed after plebiscite, 235
Scheldt river: servitude upon, 263, 264
Schleswig, annexed upon condition of plebiscite, 235, 237
Scott, Sir W., 56, 69
Sea: law of the, 294
Search. *See* Visit and search
Seas. *See* High seas
Seas, land-locked: servitudes upon, 269
Second Hague Peace Conference. *See* Hague Peace Conference of 1907
Secretary (Minister) of Foreign Affairs, 351
Selden: on British sea claims, 292
Self-defense: against direct attack, 143-145
against indirect attack, 145-150
Self-determination: "right" of, 106-107
conditions qualifying, 107-108
in relation to plebiscites, 235
Self-help: right of, 40, 381
restraints upon, 382
Self-protection, national: primary object of foreign policy, 303-305
Serbia: under treaty of Berlin, 91
as vassal state, 96
recognition of, 106
delayed recognition of government of, 113
extinction of, 116
Serbo-Croat-Slovene state. *See* Jugoslavia
Servitudes: definition of, 261
customary, 262
conventional, 262
general, 263
special, 279
positive, 280
negative, 283
Sheridan, General: war practice of, 477
Sherman, General: war practice of, 476, 477, 486
Ship's papers, 191
Siam: admitted to family of nations, 104
Sick and wounded: treatment of in warfare, 472
Sieges and bombardments. *See* Bombardment
Slave trade: suppression of, 206-209
Society of nations. *See* International community
Solent, strait of: a territorial water, 260
Soulé, Minister: affair of, 366
Sources of international law, 61-66
South African Republic. *See* Transvaal
South Africa: international status of, 99
South American states: recognition of, 105
Sovereigns: personal immunity of foreign, 185
Sovereignty: definition of, 44, 45, n. 1
law versus, 44
versus collective responsibility, 46
internal and external, 163-164
territorial, and ownership, 220
Spain: claims to exclusive jurisdiction over high seas, 222, 291
Sphere of influence, 229, 312
Sphere of interest, 229
Spies: use of, in warfare, 468
Sponsions: agreements entered into in excess of authority of agent, 323, n. 3
States: sovereign, 86
semi-sovereign, 93
neutralized, 87-90
admitted into the family of nations under conditions, 90-93
Stikine river: open to British vessels, 265
Stockton, C. H., 57
Story, Justice, 57
Straits: as boundaries, 249
territorial, 259
servitudes upon, 271
See Dardanelles and Bosphorus
Suarez, F., 50
Subjugation: as a method of terminating war, 574
Submarine automatic contact mines. *See* Mines
Submarine cables: regulation of, 296
International Convention for the Protection of (1884), 296
Submarine warfare: against warships, 512
against armed merchant ships, 514-515
against unarmed merchant ships, 515
limitations put upon, by Washington Conference, 517
Subsidies: as a cause of international friction, 313
Substantive law: as distinguished from adjective law, 130
Succession of states: universal, 117, 118
partial, 118, 120
under the peace treaties of 1919, 121-122

Suez canal: internationalization of, 274-275
Sun Yat Sen: affair of, 364
Surrender. *See* Capitulations
Suspension of arms. *See* Armistice
Sweden, 95, 104
Switzerland: neutralization of, 87
Syria: mandate over, 101

T

Tabula Amalfitana, 17
Tacna-Arica controversy, 328, n. 4
Taft-Knox treaties of arbitration, 336-337, 407
Tampico incident of 1914, 156, 388
Tariffs: as a cause of international friction, 312-313
Tarnowski, Count: affair of, 367
Taxation: exemption of diplomatic agents from, 364
Terceira: affair of landing at, 565
Termination of war, 574-580
Territorial Waters Act, British, 252
Territory: jurisdiction over, as distinct from persons, 219
acquisition of title to, 221-243
transfers of, 232-241
leases of, 243
boundaries of. *See* Boundaries
Texan bonds: in relation to obligations by succession, 119
Texas: recognition of, 106
extinction of, 116
Thalweg: as a boundary line, 247
Three-mile limit. *See* Marginal sea
Tibet: as vassal state, 97
Tordesillas, treaty of, 291
Trading with the enemy acts: United States, 448, 449, 450, n. 5, 456
British, 456
Transfer of enemy merchant ship to neutral flag, 534-536
Transvaal, the: as vassal state, 97
admitted to family of nations, 105
restrictions upon external independence, 301
Treason in war, 469
Treaties: as sources of international law, 63-66
analogous to contracts of municipal law, 316
law-making, 317
legal nature of, 318
classification of, 320
interpretation of, 331-337
termination of, 339-349
suspension of, as a form of forcible procedure, 423
effect of war upon, 440-444
of peace. 575-579
Treaties for the Advancement of Peace, 416
Treaty of Versailles. *See* Versailles
Treitschke: views of, on treaty obligations, 346
Trent: case of the, 548
Troppau: Congress of, 25
Protocol of, 25
Truces, 487. *See* Armistices
Turkey: admitted to family of nations, 83, 104
servitudes imposed upon, by treaty of Lausanne, 273, 284
Twenty-four-hour rule, 557
Two Sicilies: British reprisals against, 423

U

Ullmann, E. von, 58, 72
Ultava river: navigation of, 266
Ultimate destination: doctrine of, 540, 542, 545
Ultimatum: with conditional declaration of war, 458
Uniform: improper use of enemy, 468
Unions, International. *See* International unions
United States: as a federal state, 95
recognition of, by France in 1778, 105
continuity of in 1861-65, 115
succeeds to property of Confederate States, 119
practice of, in respect to succession, 119-121
provisions of Constitution of, in respect to extradition, 217
method of ratifying treaties, 321, n. 1
practice of, in respect to public ministers, 355, 362
practice of, in relation to responsibility of states, 389
refuses to sign Declaration of Paris, 493, 495
test of enemy character held by, 454, 509
attitude towards armed merchant ships, 514
towards obligations of neutral aliens, 529
towards neutral goods on enemy ships, 533
towards transfer of flag, 534
towards blockade, 540, 542
towards contraband, 543
towards armed enemy merchant ships, when neutral, 559-560
separate treaty of peace with Germany, 575
Unneutral service, 548-551

Upper Silesia: plebiscite to be taken in, 237
Uruguay river: navigation of, 265
Usucaption, 230
Uti possidetis, rule of, 575, 577
Utrecht, treaty of, 20, 21

V

Vassal states, 95-97
Vattel: *Droit des Gens*, 53
system of international law of, 54-55
referred to, 67, 74, 146, 210, 219, n. 1, 222, 223, 231, 235, 346, 383, n. 2, 430, n. 3, 438, n. 1, 446, 449, n. 3, 475, n. 3, 486, 488, 521, 554
Venetian palace: seizure of, by Italy (1916), 444
Venezuela: pacific blockade of, 425
Vera Cruz: seizure of, by United States (1913), 426
Versailles, treaty of: general effects of, 30-32
referred to, 89, 121, 216, 324, n. 1, 326, 328, 443, 450, 575, 576, 578
Vessels. *See* Merchant vessels; Public vessels
Victoria, F. de, 50, 51, n. 2
Vienna, Congress of: historical significance of, 24
declaration of, against slave trade, 207
classification of public ministers by, 355
Villa, F., pursuit of, by American troops in 1916, 144
responsibility of Mexico for invasion of United States by, 391
Virginius, case of the, 144
Visit and search: of pirate and slave-trading ships, 192
of enemy merchant ships, 511
of neutral merchant ships, 192, 550
Volstead act: in relation to foreign ships in port, 194
Volunteer fleets: modern use of, 494

W

Waddington, Carlos: affair of, 366
Walker, T. A.: 56
War: as a legal remedy, 40, 327
the right to make, 40, 381
"just causes of," 383
as a procedure and as a legal relation, 428
the laws of, 429
special aspects of, 430
civil, 431
sources of the law of, 432
sanctions of the laws of, 433
effect of, upon normal relations of belligerents, 440-456
effect of, upon treaties, 440-444; declaration of, 456-459
termination of, 574-579
Warfare: methods of, in ancient Greece, 9-10
in ancient Rome, 12-13
fundamental principles of, 434
changed conditions of modern, 438
methods of, 466-470
Warfare on land: laws of, 460-489
Warfare, maritime: laws of, 492-518
War rebels, 462
War treason, 469
War zones: mapping out of, during World War, 500, 541
Washburne, Minister: affair of, 367
Washington: burning of (1814), 476
Washington, Conference of, 1922: in relation to balance of power, 147
in relation to conditions in the Far East, 304
in relation to demands made by Japan upon China in 1915, 329-330
in relation to poisonous gases, 466
in relation to submarine warfare, 517
in relation to aërial warfare, 572
in relation to new rules of responsibility in warfare, 579
Washington, Treaty of: three rules laid down by, 405, 564
Water divide: as a boundary, 247
Waters, territorial. *See* Marginal sea
Webster, Daniel: quoted, 76, n. 2
Weile, Consul: affair of, 376
Westlake, J.: referred to, 56, 72
Westphalia, Peace of, 18, 19
Wharton, F., 57, n. 10
Wheaton, H., 56, 67
Wheaton's case, 362
Wilson, G. G., 57, 72
Wilson, Woodrow: requires self-determination as a condition of peace, 237
on freedom of the seas, 297-299
Winslow: extradition case of, 212
Winslow Act (1923), 450, n. 5
Wireless messages: jurisdiction over, 286-287
administrative regulation of, 287
Wireless Telegraph Convention, International, 287
Wise, Minister: recall of, 370
Woolsey, T. D., 57
World War: treatment of enemy aliens during, 446-450

status of enemy merchant ships in port at beginning of, 452
commercial intercourse between enemy citizens during, 455
German attitude of Germany towards levies en masse during, 462
use of forbidden instruments during, 465
inciting of enemy troops to revolt during, 468
treatment of prisoners during, 471
methods of bombardment during, 474
destruction of property during, 477
use of intimidation during, 477
military occupation during, 483
resort to reprisals during, 491
laying of automatic contact mines during, 500
attacks upon hospital ships during, 503
bombardment of coast towns during, 504
violations of neutral rights during, 527
practice of angary during, 530
transfer of flag during, 535
methods of blockade during, 541-542
practice regarding contraband, 546
status of reservists during, 549
destruction of neutral prizes during, 551
status of armed merchant ships during, 559
sale of munitions of war by neutral citizens to belligerents during, 568
aërial raids during, 571
Wounded, treatment of, in warfare. *See* Geneva Convention

Y

Yarrowdale: controversy regarding the, 499, n. 4
Yrujo, Minister: dismissal of, 370
Yukon river: open to British vessels, 265

Z

Zambesi: freedom of transit across, 282
Zouche, R., 52